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CURRENT EVENTS.

COURTS OF APPEAL—CRIMINAL COURTS.—The Texas Court of Appeals has been again brought to the attention of the profession and the public, this time by a most vehement and acrimonious attack made by Senator Houston upon two of the judges of that court, charging them with unconstitutional conduct and a gross violation of official duty. We do not propose to enter into the merits of this controversy, being fully satisfied that the the game is not worth the candle, but it suggests a topic which we think is worthy of consideration by lawyers and statesmen.

Texas is, we believe, the only State in the union which possesses an appellate court organized to exercise exclusive jurisdiction of all appeals in criminal cases. We believe the only fault that has been found with the system, has been based exclusively on objections to the *personnel* of the court. Separate criminal trial courts have been found very satisfactory wherever they were justified by the density of population and the crop of crime within the limits of their jurisdiction; and we can see no reason why the same arrangement cannot be made in the matter of appellate jurisdiction. From every point of the compass comes the incessant cry of overcrowded dockets and delayed justice, and everywhere efforts have been made, more or less unfortunate, to relieve supreme courts of the excess of their burdens, and to do justice to litigants.

In the early years of this century grievous complaints were made that very onerous duties were imposed by civil and ecclesiastical authorities on certain bishops, and Sydney Smith drew a very humorous picture of a bishop frantic with overwork, dashing through both houses of parliament and scattering lords and commons in the manner in which, in those days, a mad bull sometimes scattered the populace of Smithfield market. There is no danger, however, that our judges will imitate this imaginary prelate, and run a muck through legislative halls; they know a trick worth two or three of that; they decide as many cases as they comfortably can, and placidly remit the residue to the next term, and from term to term, thus swelling what might be appropriately called, in the language of Mr. Mantelini, "the demnition total."

Criminal is so far distinct from civil procedure that its segregation of criminal cases from the mass of litigation would produce no confusion or conflict of jurisdiction. The only question in the matter is the very practical one, whether the number of criminal cases in any given State would justify the expense of a separate appellate court. And in this connection it may be remarked that the rank, professional character, and salaries of judges of criminal courts of appeal, should be fully equal to those of their brethren of the civil bench, for life and liberty are at least as important as property rights, and if a State cannot or will not afford to have and pay as good judges on its supreme criminal bench, as those on its supreme civil bench, the organization of a separate supreme criminal court will be a mistake and a failure.

The segregation of criminal business from that of the supreme court of a State, if sufficient in volume to materially lessen the burdens of the civil court, is the best means of expediting the administration of justice, and as far as it goes is better than any other yet devised.

The Texas Court of Appeals is faulty in the respect of having, besides exclusive appellate jurisdiction in all criminal cases, a limited civil jurisdiction also. The intermingling with a great mass of criminal business of a few civil cases, would probably work serious injustice to the litigants on the civil side of the court. And the fact that cases committed to an irregular jurisdiction are of minor importance, does not abrogate the objection, for cases apparently trivial may be of great importance to the litigants, and every one to whose cause public policy accords an appeal at all, and who pays the costs, is entitled by virtue of such payment to the full honors of war.

Unless, therefore, the criminal cases in a State are sufficiently numerous and important, to justify an appellate court for the

adjudication of criminal cases only, and unless the creation of such a court would effectually relieve the supreme court of its excess of business, the segregation of criminal causes would not be desirable, because it would not effect the desired object. If, therefore, the evils of overcrowded and delayed justice cannot in this manner be obviated, resort must be had to the usual expedients, commissioners, intermediate appellate courts, limitations of the right to appeal, as to subject and amount involved, and more stringent rules of practice and increased judicial force. In many of the States these methods have been tried and we must say, so far as our observation extends, with very indifferent success. The relief, not of overworked judges, for we do not believe that they hurt themselves very severely, but of overcrowded dockets, yet remains a problem well worthy of the serious consideration of judiciary committees and of statesmen generally.

NOTES OF RECENT DECISIONS.

OFFICERS—STATE OFFICERS—TITLE TO OFFICE —EQUITY—INJUNCTION—EX POST FACTO LAW. — On January 9, 1888, the Supreme Court of the United States decided a case[1] of much interest involving the jurisdiction of federal courts and their power to interfere with the title to State offices, and the procedure to try such title.

The facts of the case were that proceedings were taken by the mayor and council of Lincoln, Nebraska, to remove from office Albert L. Parsons, police judge of that city. Parsons filed a bill in the United States Circuit Court for the district of Nebraska, praying that the mayor and council be enjoined from further proceeding in the matter of his removal. A preliminary injunction was granted which was disobeyed, and after a trial Parsons was removed. The mayor and several members of the council were thereupon attached for contempt, and after a hearing the circuit court imposed fines upon them, and upon default of payment committed them to prison. A writ of *habeas corpus* was sued out, and thus the case came before the Supreme Court of the United States. Mr. Justice Gray delivered an elaborate opinion deciding that the Circuit Court of the United States, sitting as a court of equity, was utterly without jurisdiction of the subject, that the injunction it granted and all its subsequent proceedings were absolutely void, that courts of equity have no jurisdiction of any criminal matter or over the appointment and removal of State public officers. He says: "To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government. Any jurisdiction over criminal matters that the English court of chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned,[2] From long before the declaration of independence, it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the court of chancery, whether those proceedings are by indictment or by summary process. Lord Chief Justice Holt, in declining, upon a motion in the queen's bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause that he should not move for an injunction in chancery in the meantime, said: 'Sure, chancery would not grant an injunction in a criminal matter under examination in this court; and, if they did, this court would break it, and protect any that would proceed in contempt of it.'[3] Lord Chancellor Hardwicke, while exercising the power of the court of chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff who had, by his bill, submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings; say-

[1] *In re* Sawyer, 25 The Reporter, 225.

[2] 2 Hale, P. C. 147; Gee v. Pritchard, 2 Swanst. 402, 413; 1 Spenc. on Eq. Jur. 689, 690; Attorney-General v. Insurance Co., 2 Johns. Ch. 371, 378.

[3] Holderstaffe v. Saunders, Holt, 136, 6 Mod. 16.

ing: 'This court has not originally and strictly any restraining power over criminal prosecutions;' and, again: 'This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus* nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of.' [4] The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.[5] Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine.[6] And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the State, or under municipal ordinances.[7] It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari* error, or appeal, or by *mandamus*, prohibition *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case, and the mode of procedure, established by the common law or by statute."

In New York,[8] a like decision has been rendered. It has also been held in Pennsylvania,[9] that an injunction cannot be granted to restrain an officer from exercising an office which he has vacated. There are like rulings in Iowa,[10] in Illinois,[11] and similar decisions have been made in Alabama.[12] The procedure for the removal of officers in Nebraska is prescribed by statute, and is judicial in its nature, to the extent of being reviewable [13] by the superior courts. The court further held that the United States Circuit Court, sitting as a court of equity, had no jurisdiction of the matter, on the ground that the action of the city council of Lincoln violated, as was alleged, the fifth and sixth amendments of the constitution of the United States; [14] nor had it such jurisdiction, on the ground that the amended ordinance in question was an *ex post facto* law, because it held that the provision of the constitution relative to *ex post facto* laws concerned only criminal prosecutions,[15] and the whole proceedings against Parsons was of a civil nature.

[4] Mayor, etc. v. Pilkington, 2 Atk. 302, 9 Mod. 273; Montague v. Dudman, 2 Ves. Sr. 396, 398.

[5] Attorney-General v. Cleaver, 18 Ves. 211, 220; Turner v. Turner, 15 Jur. 218; Saull v. Browne, 10 Ch. App. 64; Kerr v. Preston, 6 Ch. Div. 463.

[6] 2 Story on Eq. Jur. § 893.

[7] West v. Mayor, etc., 10 Paige, 539; Davis v. American Soc., 75 N. Y. 362; Tyler v. Hamersley, 44 Conn. 419, 422; Stuart v. Board Sup'rs, 83 Ill. 341; Devron v. First Municipality, 4 La. Ann. 11; Levy v. Shreveport, 27 *Ib.* 620; Moses v. Mayor, etc., 52 Ala. 138; Gault v. Wallis, 53 Ga. 675; Phillips v. Mayor, etc., 61 *Ib.* 386; Cohen v. Goldsboro Com'rs, 77 N. C. 2; Oil Co. v. Little Rock, 39 Ark. 412; Spinck v. Frances, 19 Fed. Rep. 670, and 20 *Ib.* 567; Suess v. Noble, 31 *Ib.* 855.

[8] Tapen v. Gray, 7 Hill, 259. See, also, s. c., 9 Paige, 507, 509, 512; s. c., 3 Edw. Ch. 450.

[9] Hagner v. Heyberger, 7 Watts & S. 104; Updegraff v. Crans, 42 Pa. St. 103.

[10] Cochran v. McCleary, 22 Iowa, 75.

[11] Delahanty v. Warner, 75 Ill. 185; Sheridan v. Colvin, 78 Ill. 237; Dickey v. Reed, 78 Ill. 261; Harris v. Schryock, 82 Ill. 119.

[12] Beebe v. Robinson, 52 Ala. 66; Moulton v. Reid, 54 Ala. 320.

[13] State v. Sheldon, 10 Neb. 452-456; Minkler v. State, 14 Neb. 181; State v. Meeker, 19 Neb. 444-448.

[14] Spies v. Illinois, 123 U. S. 131.

[15] Cfialder v. Bull, 3 Dall, 386.

PRESENTMENT AND ACCEPTANCE OF CHECKS.

Presentment.—Checks have been classed generally with inland bills of exchange, though differing in some respects from the latter,[1] and have been held not binding on the drawee[2] until there has been a presentation and acceptance by the bank in some form.[3] It is the settled law that the holder or payee of a bank check must present it to the drawee for payment within a reasonable

[1] See, on resemblances and differences, Harrison v. Wright, 100 Ind. 515; s. c., 50 Am. Rep. 805; Griffin v. Kemp, 46 Ind. 172; Henshaw v. Root, 60 Ind. 220; Purcell v. Allemong, 22 Gratt. 739; First Nat. Bank of Cincinnati v. Coats, 3 McCrary, 9; Rosenthal v. Mastin Bank, 17 Blatchf. 318; Boone on Corp., § 224; Newmark on Bank Deposits, § 203.

[2] 2 Rand. Com. Paper, § 568, citing 1 Parsons Notes & Bills, 71, and Martin v. Bailey, 4 Am. L. Reg. 632.

[3] Creveling v. Bloomsbury Nat. Bank, 46 N. J. L. 455; s. c., 50 Am. Rep. 417. Need of averment of demand and notice: Schultz v. Depuy, 3 Abb. Pr. 252. See Dowling v. Hunt (Arizona), 7 Pac. Rep. 496.

time, and if he fails to do this, and the bank upon which the check is drawn becomes insolvent in the meantime, the drawee is relieved from liability, at least *pro tanto*, and the loss must fall upon the holder.[4]

If a check is unpaid on presentation, the holder has his remedy against the maker or indorser, and the maker has his against the bank for damages sustained to his credit, or otherwise, by the illegal refusal to pay his check when drawn against funds remaining in the bank.[5]

But the holder of a check, in order to recover against the drawer, must prove the presentment and notice of non-payment, or some legal excuse for the absence thereof.[6] It is the general rule in respect to checks, however, that the holder has no recourse upon the drawer until the check has been presented to the bank and payment refused, and such presentment and refusal are essential preliminaries to an action against him.[7] And the same rules which are established in relation to the necessity of presentment and notice, in order to charge the drawer and indorser of bills of exchange in general, apply as well to checks.[8] Indeed, the fact that the check is to be drawn against deposited funds makes it of even greater importance than in the case of a bill, that a check should be presented, and that the drawer should be notified of non-payment in order that he may speedily inquire into the causes of refusal, and be placed in a position to secure his funds which were deposited in the bank.[9]

If one party sues another and garnishees the bank wherein the latter has funds, the rights of the former have been held, upon a preference between conflicting views concerning the effect of a check, paramount to those of one to whom, before suit is brought, the latter gave a check which was not presented at the bank until after service of the garnishee process.[10]

Time for Making Presentment.—Where the payee to whom the check is delivered by the drawer receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any time before the close of banking hours on the next day, and if, in the meantime, the bank fails, the loss will be the drawers.[11] But in a case where the bank and the payee are in different places, the presentation must be made within a reasonable time, taking all the circumstances in consideration; and when no more time is taken than is fairly required in the usual and ordinary courses of business, special inconvenience and special circumstances con-

[4] Security Co. v. Ball, 107 Ind. 165; s. c., 21 Cent. L. J. 319; s. c., 1 N. E. Rep. 567. In case of such delay as would have this effect, the loss from which the drawee would be relieved would be the actual loss suffered by the failure of the bank: *Ibid.* And if that loss should be the entire amount on deposit, the drawee would be relieved entirely from liability upon the check; while, if the bank should pay, or be able to pay one-half or any part of the amount on deposit to meet the check, the exoneration of the drawer would be proportionately less: See Griffin v. Kemp, 46 Ind. 176; Henshaw v. Root, 60 Ind. 220. But this principle of law could not be made available where it is merely averred that the bank suspended payment, but not that the depositors suffered any loss thereby, even if it would apply where the check was held by the drawer pending the completion of a contract, and never passed into the hands of the payee, so that it could not be presented by him for payment: Security Co. v. Ball, just cited. Consult, further, Newmark on Bank Deposits, §§ 212-213.

[5] Creveling v. Bloomsbury Nat. Bank, 46 N. J. L. 255; s. c., 50 Am. Rep. 417. See also Viets v. Union Nat. Bank, 101 N. Y. 563; s. c., 5 N. E. Rep. 457; Newmark on Bank Deposits, § 217.

[6] Mechanics', etc. Ins. Co. v. Coons, 35 La. Ann. 364.

[7] Compton v. Gilman, 19 W. Va. 312; s. c., 42 Am. Rep. 776, 779; 2 Danl. Neg. Instr. (3d ed.) § 1586.

[8] See according to writer just cited Purcell v. Allemong, 22 Gratt. 742; Cruger v. Armstrong, 3 Johns. Cas. 79; Conroy v. Warren, 3 Johns. Cas. 259; Franklin v. Vanderpool, 1 Hall, 80; Murray v. Judah, 6 Cowen, 484; Merchants' Bank v. Spicer, 6 Wend. 445; Harker v. Anderson, 21 Wend. 372; Conkling v. Gandall, 1 Keyes, 228; Middletown Bank v. Morris, 28 Barb. 616; Judd v. Smith, 3 Hun, 190; Levy v. Peters, 9 Serg. & R. 125; Edwards v. Moses, 2 Nott & McCord, 433; Daniel v. Kyle, 5 Ga. 245; Humphreys v. Bicknell, 2 Litt. 298; Ford v. McClung, 5 W. Va. 156; Pollard v. Bowers, 57 Ind. 234; Clark v. Bank, 2 McArthur, 249; Farwell v. Curtis, 7 Biss, 160; Sherman v. Comstock, 2 McLean, 10; Edwards on Bills, 396.

[9] Purcell v. Allemong, 22 Gratt. 742; Eichelberger v. Finley, Harr. & J. 381; Moody v. Murk, 43 Miss. 210; Pack v. Thomas, 13 Smedes & M. 11; Franklin v. Vanderpool, 1 Hall, 78; Foster v. Paulk, 41 Me. 425; True v. Thomas, 16 Me. 36; Merchants' Bank v. State Bank, 10 Wall. 657; Matter of Brown, 2 Story, 502; Hoyt v. Seeley, 18 Conn. 353; Linville v. Welch, 29 Miss. 203; Humphreys v. Bicknell, 2 Litt. 296; Case v. Morris, 31 Pa. St. 100; 2 Parsons Notes & Bills, 71; 2 Danl. Neg. Instr., § 1586, so citing these authorities and further discussing presentment and protest of checks in §§ 1587-1600. The text is also quoted in Compton v. Gilman, 19 W. Va. 312; s. c., 42 Am. Rep. 776, 779, which cites in further support, Harker v. Anderson, 21 Wend. 372; Cox v. Boone, 8 W. Va. 12; s. c., 23 Am. Rep. 627.

[10] Imboden v. Perrie, 13 Lea, 504, 505.

[11] Wear v. Lee, 87 Mo. 358; citing 2 Danl. Neg. Instr., §§ 1590, 1591; 2 Parsons Notes & Bills, 73; Story on Bills, § 471.

sidered, the holder, in case of failure of the bank upon which the check is drawn before presentation, should not be held to suffer the loss.[12] Accordingly, it has recently been held that delay in presenting a check for payment was not such as would released the debt for which it was given, where a check for a small sum was given late in the afternoon at a lumber camp twenty miles from the place where the bank was, to a merchant whose place of business was twenty-seven miles by rail in another direction, and who had to be there on the following day, which was Saturday, but who, on Monday morning, left the check at a local bank for collection, and next day was informed that the check had been presented and refused, as the other bank had failed on Monday morning.[13] Yet it may be regarded as now settled, that the drawer of a check is not relieved simply by the failure to present the check at the bank promptly, but he must show that by such failure he was injured[14] or suffered loss.[15] Hence, where it was not pretended that the failure to present a check occasioned any loss or damage to the drawer, it was held that delay in the presentation of the check did not, in itself, discharge him; and that though it raised a strong presumption that in some way the amount originally due by that check was satisfied, which presumption would be conclusive under ordinary circumstances, yet it was overcome by such facts as a letter proposing to give 12 per cent. for the use of the money and an exchange of checks, the very nature of which transaction constituted a valid excuse for not presenting the check for payment, and accounted for the delay.[16]

Waiver of Delay in Presentation.—While it is settled that a check should be presented promptly to the bank for payment, as otherwise the drawer will not be responsible and no action can be maintained against him upon the check, it is equally well settled that the necessity for such presentment may be waived by the representations and conduct of the drawer;[17] and though it has been held that, unless a check is promptly presented for payment at the bank, the drawer is discharged from liability whether any injury has been sustained by reason of the failure to present or not.[18]

Acceptance.—A bank is not liable, according to the apparent weight of authority, to an action upon a check drawn upon it by a depositor, unless it has accepted it,[19] and acceptance is a question of fact.[20] Checks being payable on demand, such acceptance may be by payment, or by credit given to the holder, and charge against the drawer, or by certification.[21] Nor are the last two named modes the only modes of acceptance which would bind the bank by a legal obligation to the holder, but this effect may be produced by an express acceptance in words, or by a retention of the check, as for an indefinite period, or even for one[22] day, and a positive promise to pay it.[23] So it has been held that an acceptance of a check might be implied

[12] Freiberg v. Cody, 55 Mich. 108, 110, 111, citing Phœnix Ins. Co. v. Allen, 11 Mich. 501; Nutting v. Busker, 48 Mich. 241. These cases, however, relate to drafts, though discussing the subject as applicable to negotiable instruments in general.

[13] Freiberg v. Cody, 48 Mich. 108, 110, 111. So it has been held that the retention of a check for two or three days without presenting it, does not necessarily put one, then taking it for a valid consideration, on inquiry concerning its original consideration: Laber v. Steppacher, 103 Pa. St. 81, 83; citing Walker v. Geisse, 4 Wheat. 256.

[14] See 2 Parsons Notes & Bills, 74; Cox v. Boone, 8 W. Va. 510; s. c., 23 Am. Rep. 627; Bell v. Alexander, 21 Gratt. 1; 2 Danl. Neg. Instr., § 1587.

[15] Compton v. Gilman, 19 W. Va. 312; s. c., 42 Am. Rep. 776, 779, 780. See to like effect, Cogswell v. Bank, 59 N. H. 43, 45, citing also Edwards on Bills, 396, and Byles on Bills, 14.

[16] Compton v. Gilman, 19 W. Va. 312; s. c., 42 Am. Rep. 776, 780.

[17] Compton v. Hill, 19 W. Va. 312; s. c., 42 Am. Rep. 776, 779. What representations and conduct are sufficient to dispense with the prompt presentation of the check, are matters of fact to be determined under the circumstances of each case: *Ibid.* Citing 2 Parsons Notes & Bills, 71, 72; Devendorf v. West Virginia Oil Co., 17 W. Va. 174; Commercial Bank v. Hughes, 17 Wend. 94; Franklin v. Vanderpool, 1 Hall, 78; Cox v. Boone, 8 W. Va. 510; s. c., 23 Am. Rep. 627.

[18] See Harker v. Anderson, 21 Wend. 372; 2 Parsons Notes & Bills, 74; Ford v. McClung, 5 W. Va. 156.

[19] See Creveling v. Bloomsbury Nat. Bank, 46 N. J. L. 455; s. c., 50 Am. Rep. 417. Apparent weight of authority: See Harrison v. Wright, 100 Ind. 515; s. c., 50 Am. Rep. 805; Newmark on Bank Deposits, § 211. Action on unaccepted check: Dickinson v. Coates, 79 Mo. 250; s. c., 49 Am. Rep. 228; s. c., 18 Cent. L. J. 71, 73, with note.

[20] Northumberland Bank v. McMichael, 106 Pa. St. 460; s. c., 51 Am. Rep. 529.

[21] Creveling v. Bloomsbury Nat. Bank, 46 N. J. L. 255; s. c., 50 Am. Rep. 417.

[22] See Kilsby v. Williams, 5 Barn. & Ald. 815; Boyd v. Emerson, 2 Ad. & El. 184.

[23] Northumberland Bank v. McMichael, 106 Pa. St. 460; s. c., 51 Am. Rep. 529; distinguishing Bank v. Millard, 10 Wall. 152.

from the circumstances, that in settling the drawer's account, the drawee retained an amount sufficient to meet the outstanding check drawn in favor of the plaintiff.[24] The fact that a check has been paid on a forged indorsement, does not prevent the payee from accepting it, and bringing suit precisely as though there had been no indorsement and payment.[25]

Dishonor.—A bank is liable in temperate damages to a customer for wrongful dishonor of his check without special damages;[26] but a banker is not liable for the dishonor of a check where the amount thereof is left blank in the body of the instrument,[27] or where the depositor of the check knew that he had not funds sufficient to pay it.[28] The giving of a check on a bank transfers at once the amount of funds called for by the check from the drawer to the drawee, when the drawer has funds at the bank,[29] and if the bank refuses to pay from any cause the drawer is entitled to notice, so he may inquire into the cause of such refusal.[30] In a suit by the payee of a check against the drawer, oral evidence of presentment and dishonor is admissible, but it must be certain and exact.[31]

[24] Saylor v. Bushong, 100 Pa. St. 23; s. c., 45 Am. Rep. 353. Consult, further, Newmark on Bank Deposits, § 214.

[25] Indiana Bank v. Holtsclaw, 98 Ind. 85, 87, 88.

[26] Birchall v. Third Nat. Bank, 19 Cent. L. J. 390, with extended note, 391.

[27] Hulls v. The Commercial Bank, 19 Cent. L. J. 254.

[28] St. Louis, etc. Bottling Co. v. Colorado Nat. Bank, 8 Colo. 70; s. c., 5 Pac. Rep. 800. Payment in worthless check: Commonwealth v. Devlin, 141 Mass. 423; s. c., 6 N. E. Rep. 64. Distinguishing Haskins v. Warren, 115 Mass. 514, and citing Bussey v. Barnett, 9 Mees. & W. 312. See Newmark on Bank Deposits, § 215.

[29] Dowling v. Hunt (Arizona), 7 Pac. Rep. 496.

[30] Dowling v. Hunt, just cited. Treasurer of bank known by him to be insolvent, and not indebted to him on a settlement of account, not in condition to be injured by failure to receive notes of dishonor: Warrensburg, etc. Assn. v. Zall, 83 Mo. 94; noted, 20 Cent. L. J. 36. See Newmark on Bank Deposits, § 216.

[31] Mechanics', etc. Ins. Co. v. Coons, 36 La. Ann. 271, 272.

PAROL CONTRACT FOR SALE OF LAND — STATUTE OF FRAUDS—EVIDENCE—CONSIDERATION — BOUNDARIES — ADVERSE POSSESSION—DAMAGES—RESCISSION.

BRINSER V. ANDERSON.

Supreme Court of Pennsylvania, January 3, 1888.

1. To establish a parol contract for the sale of land and take it out of the statute of frauds, the existence of the contract and its terms must be shown by full, complete and satisfactory, and indubitable proof. The evidence must define the boundaries and fix the consideration; exclusive and notorious possession must have been taken under it, and continuously maintained; and the contract must have been so far in part performed that compensation in damages would be inadequate and rescission inequitable and unjust.

2. When one is in possession of real estate claiming under a parol contract of sale and also under a lease, a purchaser of the land, who has no knowledge of the lease, is chargeble with notice of any equities that the person in possession may have.

3. If the purchaser had knowledge of the lease of the person in possession and no other circumstances to put him on inquiry, as to the rights and equities in possession, he might be regarded as an innocent purchaser.

4. In ejectment plaintiff, claiming under a parol contract entered into with one of the heirs of a number, must, to maintain his title, show the authority of the heir act for the others.

CLARK, J., delivered the opinion of the cour:

It is agreed that John Snyder owned, and died seized of, the premises in dispute. Both parties rely on this common source of title. The plaintiffs, on the one hand, are the heirs at law of John Anderson, deceased; who, they allege, in his lifetime, in the year 1857, purchased the premises under a parol contract from the heirs of John Snyder, then deceased; and their claim is that this parol contract has been so far in part executed as to render it unjust and inequitable to rescind the same. The defendant, on the other hand, claims under a regularly executed conveyance from the heirs of Snyder to J. Hoffman Hershey, dated twenty-second November, 1858, and under deed from Hershey to him, dated August 19, 1884; he denies that any such parol sale was made; and that if it had been, the defendant purchased without notice of it; and, further, that if any such equitable right or title ever existed, it was subsequently abandoned and nullified by an agreement to take the premises under a lease at a certain yearly rent.

The first question arising in the case, therefore, is whether or not, if the evidence is believed, a parol contract has been established by sufficient proof, and enough shown to take the case out of the statute of frauds. This was a question of law for the court below, and is for our consideration here. Overmeyer v. Koernerf 81 Pa. St. 517. To establish a parol contract for the sale of land, and take it out of the statute of frauds. the existence of the contract and its terms must be shown by

full, complete, satisfactory and indubitable proof; the evidence must define the boundaries and fix the consideration; exclusive and notorious possession must have been taken under it, and continuously maintained; and the contract must have been so far in part performed that compensation in damages would be inadequate, and rescission inequitable and unjust. Hart v. Carroll, 85 Pa. St. 508. In Jamison v. Dimock, 95 Pa. St. 52, it was held, however, that in the case of a parol sale for a money consideration, fully paid according to the contract, where the possession was taken and continuously held in pursuance thereof, it is not essential that the improvements should be such as could not be compensated in damages; that the equities of the vendee might rest upon other equally available grounds.

In the case at bar, the parol agreement is alleged to have been made by Washington R. Snyder, one of the heirs, in his own behalf, and "representing" the remaining heirs of John Snyder, deceased. Who the remaining heirs were does not distinctly appear in the proofs. The defendants read in evidence the deed to J. Howell Hershey, purporting to be from the heirs and legal representatives of John Snyder, deceased; and, from the note made of it in the evidence, it would seem that he left at least four children and heirs, viz.: Washington R. Snyder, Maria, intermarried with Christian Fisher, Sarah, intermarried with John Winnagle, and Catherine, intermarried with one Snavely. Whether or not there were any others does not appear.

It is undoubtedly true that there was a contract for the sale of this lot by Washington R. Snyder to John Anderson, made in the year 1857. The receipt, dated twenty-second October, 1857, taken with the other evidence in the case, is full and complete on this point. The terms of the contract are, we think, sufficiently shown. The lot is described as "No. 258 in the Borough of Middletown;" which may be regarded, perhaps, as a proper designation of the boundaries. The consideration was $300, a considerable part of which, if not all, was shown to have been paid. Possession was taken immediately after, and in pursuance of the purchase, and a dwelling-house was erected upon it. The possession was open and notorious, and was continuously maintained for many years, and until legal proceedings were instituted to test the title. But how, and by what authority, did Washington R. Snyder represent his sisters in the sale? Was he their attorney in fact, regularly constituted, or was he their agent by parol merely? He might, perhaps, enter into a parol contract in respect to his own interest; but could he without authority bind his sisters? They were not present; they do not appear to have participated in the sale or to have approved it after it was made. It does not appear that they received any portion of the purchase money, or, indeed, that they ever knew any such contract was made, at least until after their conveyance to Hershey. We are not to presume that Washington R. Snyder had power to sell his sisters' shares simply because he assumed to have it; and, if he had not the power, his contract to that effect was of no validity whatever as to them; it was just as if it had never been made, and there is not the slightest proof that any such powers existed.

The transaction in question occurred nearly thirty years ago, during nearly all of which time the plaintiffs had been in possession under claim of title. It cannot be expected, perhaps, after this great lapse of time, that the proof should be as precise as if it related to a recent occurrence; but a person purchasing real property knows, or ought to know, that the law requires the evidence of his title to be in writing. The burden of proof is therefore upon him. The delay, as in this case, is frequently his own fault; and this stringent but salutary rule of evidence will not generally be relaxed in his favor. It was incumbent, therefore, upon the plaintiffs not only to establish the existence of a contract made by Washington R. Snyder, and the terms of that contract, but also his authority for making the same. But, assuming that on the re-trial of this case proof may be made of the authority of Washington B. Snyder to represent his sisters in the sale, we come next to consider the question as to the effect of the written agreement made between Hershey and Anderson on the 30th of December, 1875:

"This agreement, made the 30th day of December, A. D. 1875, between J. Hoffman Hershey, of West Hempfield township, Lancaster county, and State of Pennsylvania, of the one part, and John Anderson, of Middletown, Dauphin county, of the other part, witnesseth, that the said J. Hoffman Hershey doth lease and let unto the said John Anderson all that certain house, out-buildings, and lot of ground numbered 258, being a corner lot and fronting on Market street, and now in the occupancy of said John Anderson, situate in the borough of Middletown, in the county of Dauphin, to have and to hold the said premises, monthly, if the said John Anderson shall prove himself satisfactory to the said J. Hoffman Hershey, and if not, the said J. Hoffman Hershey hereby reserves the right to remove the said John Anderson and family, with his goods, from the house and premises, as a tenant at will, at any time during said term. The said John Anderson hereby promising and agreeing to pay as rent, for each month, in advance, the sum of $2, commencing on April 1, A. D. 1876, upon the conditions aforesaid, and also pay all taxes assessed on said property during the occupancy of the same. The said John Anderson agrees also to do such labor or work (at the customary wages) as the said J. Hoffman Hershey shall direct him to do. He shall suffer no damages to be done whilst occupying said premises, nor do any himself, but agreeing peaceably, at any time, as hereinbefore reserved, to yield up the premises to the said J. Hoffman Hershey, or his agent, etc.

"In witness whereof we have hereunto set our

hands and seals the day and year aforesaid.

"J. HOFFMAN HERSHEY. [L. S.]
"JOHN ANDERSON." [L. S.]

It is contended on the part of the defendant that this writing was an abandonment of any equity Anderson may have acquired under the parol purchase alleged; and that he and his heirs are thereby estopped from claiming any title to the lot. The lease was, undoubtedly, evidence of abandonment; and was, with all the other evidence in the case, for the consideration of the jury; but it cannot be set up as an estoppel. Hershey was the holder of the legal title. Anderson had for eighteen years made default in the payment of the purchase money; and it was Hershey's clear right, by an equitable ejectment at any time, to rescind the contract and recover the possession. But he might contract, in the form of a lease or otherwise, with the defaulting vendee, for the continuance of his possession for fixed periods of time, on terms agreed upon, the rent to be applied to the interest or principal of the purchase money. Abandonment includes both the intention to abandon and the external act by which that intention is carried into effect. Intent is the essence of the act; and therefore the facts are in each particular case for the jury. Clemmen's Lessee v. Gotshall, 4 Yeates, 330; Atchison v. McCullock, 5 Wall. 13; Heath v. Biddle, 9 Pa. St. 273; Kunkel v. Wolfensberger, 6 Watts. 126. Very similar to this is the case last cited. There the owner of the equity of redemption executed a lease of the mortgaged premises to the mortgagee, covenanting to pay to him an annual rent of $24, together with the taxes and repairs. It was argued in that case, as it is in this, on the one hand, that the acceptance of the lease was a relinquishment of the equity; on the other hand, it was contended that the lease was only a mode adapted for securing the possession for a definite time, and providing for the interest in the form of rent, and that whether it was or was not was for the jury. Chief Justice Gibson, delivering the opinion of the court, said: "The only original thing in the cause, and it is not of difficult solution, is the effect of the lease from one of the defendants to the grantor, under whose title the plaintiff claims, which is said to be a decisive circumstance, either to rebut the alleged mortgage originally, or to dissolve the relation created by it, if it ever existed; and that is a matter of law for the court. But why should the relation of landlord and tenant be thought inconsistent with that of mortgagor and mortgagee? Without it, a mortgagor is an occupant liable to be turned out at a moment's warning; and it is hard to imagine why a stipulation for a certain term, at a rent equivalent to the interest, may not be reconciled to the intention of the principal contract."

If a lease under such circumstances was not inconsistent with the relation between mortgagor and mortgagee, we cannot see how it could be supposed to be inconsistent, under like circumstances, with the relation of vendor and vendee. We think the court was right, therefore, in submitting to the jury "whether Hershey took the deed from Snyder in the interest of Anderson, and to enable Anderson, by paying the $150 on the footing of the lease, to obtain title to the lot." "If Anderson in making this lease," says the learned court, "and Hershey in taking the lease, did not intend that Anderson was acknowledging that he had no title to the property, but it was for the purpose of carrying out that arrangement, and of securing the payment of the $150, the giving of the lease would not, as a pure matter of law, prevent Anderson or his heirs from setting up a claim of title; and we leave to you to determine what his intention was, from all the facts in the case, in the giving of the lease." There was evidence in the cause from which the jury might well find that Anderson did not intend, by the execution of the lease, to abandon his title. He seems to have regarded the deed to Hershey as collateral security for the $150 which Hershey advanced in discharge of the purchase money; and Hershey himself, if the testimony of George Anderson and Amanda Harley is believed, regarded the $150 as a loan to Anderson for the purpose stated. Upon the evidence of these witnesses, although there was certainly much countervailing proof, the court could not do otherwise than submit the question to the jury.

But it is said that Brinser was a *bona fide* purchaser, without notice of any equity in Anderson; and therefore his title is not affected by it. This would seem to be true, unless, by the possession of Anderson, Brinser was put upon inquiry as to the title under which the possession was maintained. Anderson was, at the time, in possession under the terms of the paper which has been denominated a "lease;" and if Brinser had actual knowledge of the lease, and had no knowledge of the facts relating to its execution, it is probable, under the ruling of this court, in Leach v. Ansbacher, 55 Pa. St. 85, he might be regarded as an innocent purchaser. "Nothing in the transaction," says Mr. Justice Thompson, in the case last cited, "gave the least sign to put the purchaser upon inquiry. The possession will, it is admitted; but when the party is in possession under a lease, that knowledge of the lease dispenses with the inquiry of how the possession is held. That knowledge the agent had, and of the very terms of the lease. That was enough for him. He was not bound to inquire of the tenant in possession if the lease was fair or fraudulent, or whether there was a trust notwithstanding." Sedg. Vend. 339; Hood v. Fahnestock, 1 Pa. St. 474. But there is not the slightest evidence in this case that Brinser knew of the lease; and we are not to assume a fact that has not been proved. If he had no knowledge of the lease, then plainly the possession put him upon inquiry as to the ground of that possession; and he is chargeable, constructively, with the knowledge of every fact which due and proper inquiry would have

brought to light. Leonard's Appeal, 94 Pa. St. 168. The possession of Anderson was notice of the title under which that possession was maintained.

Judgment reversed, and a *venire facias de novo* awarded.

NOTE.—There are several important questions decided and commented on in the principal case, among the first of which is, what must be shown in a parol contract for the sale of land that will take it out of the statute of frauds. The statute of frauds, as its name would indicate, was passed for the purpose of preventing, not aiding, fraud; and the courts have at all times construed it with that object and purpose in view.

Thus, the doctrine was settled at an early day in England and has been fully adopted in nearly all of the American States, that a verbal contract for the sale or leasing of land, if *part performed* by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds.[1] The ground is equitable fraud; not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense. If the defendant knowingly permits the plaintiff to do acts in part performance of the verbal agreement, acts done in reliance on the agreement, which change the relations of the parties and prevent a restoration to their former condition, it would be a virtual fraud for the defendant to interpose the statute as a defense and thus to secure for himself the benefit of the acts of part performance while the plaintiff would be left, not only without adequate remedy at law, but liable as a trespasser.[2]

The acts of part performance, therefore, must be done in pursuance of the contract, and must alter the relations of the parties. The most important acts which constitute a sufficient part performance, are actual possession, permanent and valuable improvements, and these two combined.[3] The important acts which do constitute a sufficient part performance are actual, open possession of the land, or permanent and valuable improvement made on the land. Acts done prior to the contract, or acts merely preparatory or ancillary to the agreement, such as delivery of abstract of title, measuring the land, drawing up deeds, etc., will not be sufficient. Previous possession will not take a parol conveyance out of the statute. Possession must be taken in pursuance of the parol sale.[4]

In Brown v. Hoag,[5] it was said that the underlying principle upon which courts enforce oral agreements within the statute of frauds on the ground of part performance, is that when one of the parties has been induced to alter his situation, on the faith of the oral agreement, to such an extent that a refusal to enforce it would result, not merely in the denial of the rights which the agreement was intended to confer, but in the infliction of an unjust and unconscionably injury and loss upon him, the other party will be held estoppel by force of the acts from setting up the statute. The acts constituting "part performance" must have been done in reliance upon and in pursuance of the oral agreement, and be related to and connected with it, but are not confined to doing what the contract stipulates; that is "part performance" strictly so-called.

The Pennsylvania Supreme Court has in several cases decided in accordance with the principal case, that to take the case of a parol sale of land out of the statute of frauds, the vendee must also take actual, open, notorious, exclusive and continuous possession of the premises in pursuance of the contract; and when the whole purchase money has not been paid he must have made such improvement thereon as cannot reasonably be compensated in damages.[6] And when an attempt is made to establish title to land, under a parol contract, proof thereof in all its essentials and in all its equities should be so plain and clear as to preclude doubt or hesitation as to the contract and the equities arising thereunder. Especially is this so where the part performance can be readily compensated in damages.[7] And the owner of wild and uncultivated land is deemed in possession so as to maintain trespass unill an adverse possession is clearly made out.

A mere oral license to construct a railway track over the land of another, as distinguished from an oral agreement of the sale of the right of way, cannot be enforced in equity, even after the expenditure of a large sum of money in constructing the road on the faith of it.[8]

In Moss v. Culver,[9] it was held that a mutual transfer of possession of lands, under a parol contract, which continues exclusive and undisturbed for nineteen years, is a valid transfer of titles and is not within the statute of frauds.

In Western Union Tel. Co. v. R. R. Co.,[10] it was held that where a written contract between a railway company and a telegraph company, for the building and operating of a telegraph along the railway, was signed by the telegraph company and a copy of it was sent to the railway company which accepted it by letter of its agent, but did not sign it, and the telegraph company made large expenditures under the contract and for

[1] Barnes v. Boston R. Co., 130 Mass. 338; Sherman v. Scott, 27 Hun, 331; Wharton v. Stoutenburgh, 35 N. J. Eq. 266; Jamison v. Dimock, 95 Pa. St. 52; Lamb v. Hinman, 46 Mich. 112; Judy v. Gilbert, 77 Ind. 96; Hibbur v. Aylott, 52 Tex. 530; Hanlon v. Wilson, 10 Neb. 138; Manley v. Howlett, 55 Cal. 94; Littlefield v. Littlefield, 51 Wis. 23; Wallace v. Rappleye, 103 Ill. 229; Hiatt v. Williams, 72 Mo. 214; Armes v. Bigelow, 3 McArth. 442; Grant v. Ramsey, 7 Ohio St. 157; Gregg v. Hamilton, 12 Kan. 333; Ford v. Finney, 35 Ga. 258; Cole v. Cole, 41 Md. 301; Lowry v. Buffington, 6 W. Va. 249; Freeman v. Freeman, 43 N. Y. 34; Hall v. Whittier, 10 R. I. 535; Eaton v. Whittaker, 18 Conn. 222; Tilton v. Tilton, 9 N. H. 385.

[2] See 3 Pom. Eq. 456, *n;* 2 *Id.* §§ 864–867.

[3] Possession: See Anderson v. Simpson, 21 Iowa, 399; White v. Watkins, 23 Mo. 423; Catlett v. Bacon, 33 Miss. 269; Danforth v. Laney, 28 Ala. 274; Reed v. Reed, 12 Pa. St. 117; Malins v. Brown, 4 N. Y. 403; Gregory v. Trighall, 18 Ves. 328; Shillebeer v. Jarvis, 8 DeG. M. & G. 79. Improvements: See Neale v. Neale, 1 Wall. 1; Hoffman v. Fett, 39 Cal. 109; Poland v. O'Conner, 1 Neb. 50; Ingle v. Patterson, 36 Wis. 373; Sackett v. Spencer, 65 Pa. St. 89; Wimberly v. Bryan, 55 Ga. 198; Cagger v. Lansing, 43 N. Y. 550; Potter v. Jacobs, 111 Mass. 32; Miller v. Tobie, 41 N. H. 84; Crook v. Corper, L. R. 6 Ch. 551; Wills v. Straddling, 3 Ves. 378. Special acts and services: See Edwards v. Estell, 48 Cal. 294; Crank v. Trumble, 66 Ill. 482; Johnson v. Hubbell, 2 Stockt. Ch. 332; Twiss v. George, 33 Mich. 253; Vanebryne v. Vreeland, Beas. 142; Davison v. Davison, 2 *Id.* 246; Rhodes v. Rhodes, 3 Sandf. Ch. 279.

[4] Birbeck v. Kelley (Penn., 1887), 9 Atl. Rep. 313.

[5] S. C. Minn., 1886; 29 N. W. Rep. 135.

[6] Miller v. Zufall, 6 Atl. Rep. 352; Hart v. Carroll, 85 Pa. St. 508; Ballard v. Ward, 89 *Id.* 358; Ditrick v. Shearer, 95 *Id.* 521.

[7] Miller v. Zufall, *supra.*

[8] St. Louis, etc. v. Wiggins Ferry Co., 122 Ill. 387; S. C., 34 Am. Rep. 243.

[9] 64 Pa. St. 414; S. C., 3 Am. Rep. 601.

[10] 86 Ill. 244; S. C., 29 Am. Rep. 28.

more than a year both parties executed it, the contract was binding upon the railway company; was sufficiently signed, within the statute of frauds, and was taken out of the statute by part performance.[11]

Another very important question decided is what notice will be sufficient to prevent a purchaser from being *bona fide*. In the principal case it was held that if the purchaser knew of the lease under which the person in possession was holding his tenancy, he might rely upon the statements of the lease, and he might rely on the fact of the existence of the lease as showing that the person in possession was merely a tenant. If, however, he did not know of such a lease, the existence of the same will be of no avail against a person in possession of the premises. The general rule is that a purchaser or incumbrancer of an estate who knows or is properly informed that it is in the possession of a person other that the vendor or mortgagor with whom he is dealing, is thereby charged with a constructive notice of all the interests, rights, and equities which such possessor may have in the land. He is put upon an inquiry concerning the grounds and reasons of the stranger's occupation, and is presumed to have knowledge of all he might have learned by means of an inquiry duly and reasonbly prosecuted. If he neglects to make inquiry, or to make it with due diligence, the presumption and notice of course remain absolute.[12] The fact that a party has occupied and farmed a piece of ground for several years after the occupation of a former tenant who has since left the locality and remained away, is sufficient to put a would-be purchaser from the former occupant upon inquiry as to who can convey.[13] Actual possession of a part, is legal possession of the whole of a tract covered by the title under which the actual possession of a part is taken, and possession of the part will impart notice of the possessor's title to the whole tract.[14]

The possession of real estate by a husband and wife impart notice of the wife's equities as against all not claiming under the husband.[15] Open, notorious, and exclusive possession by a tenant is sufficient to put a purchaser upon inquiry as to his landlord's title.[16] When a party is in possession of the land at the time of the sale thereof, claiming to hold the same under a lease for a term of years, the possession is notice of subsisting equities and rights claimed.[17]

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[11] Anderson v. Shockley, 19 Cent. L. J. 172; Shriver v. Eckenrode, 11 *Id.* 415.

[12] Taylor v. Stiffert, 2 Ves. 437-450; Holmes v. Powell, 8 DeG. M. & G. 572-581; Penny v. Watts, 1 Macn. & G. 150-165; Allen v. Anthony, 1 Meriv. 284; Hardy v. Reeves, 5 Ves. 426; Daniels v. Davidson, 16 Ves. 249; Rogers v. Jones, 8 N. H. 264; Hull v. Noble, 40 Me. 459; Johnson v. Clark, 18 Kan. 157; School Dist. v. Taylor, 19 U. S. 164; Tankard v. Tankard, 79 U. S. 54; Strickland v. Kirk, 51 Miss. 797; Noyes v. Hall, 7 Otto, 38; Moss v. Atkinson, 44 Cal. 17; Russell v. Sweezy, 22 Mich. 235; Sears v. Munson, 23 Iowa, 380; Phillips v. Costley, 40 Ala. 486; McKenzie v. Perrill, 15 Ohio St. 162; Glidewell v. Spaugh, 26 Ind. 319; Bank of Orleans v. Flagg, 3 Barb. Ch. 316; Diehl v. Page, 3 N. J. Eq. 143; Wood v. Farmer, 7 Watts, 382; Ringold v. Bryan, 3 Md. Ch. 488; Baynard v. Norris, 5 Gill, 468; Webber v. Taylor, 2 Jones Eq. 9.

[13] Richards v. Snyder (Oreg., 1885), 6 Pac. Rep. 186. See Deetjen v. Richter (Kan., 1885), 6 Pac. Rep. 595; Pearley v. McFadden (Cal., 1886), 10 Pac. Rep. 179; Taylor v. Cent. Pac. R. Co. (Cal., 1885), 8 Pac. Rep. 436.

[14] Watters v. Connelly, 59 Iowa, 217; Nolan v. Grant, 51 *Id.* 519.

[15] Iowa Loan, etc. Co. v. King, 58 Iowa, 598.

[16] Burt v. Baldwin, 8 Feb. 487; Conlee v. McDowell, 15 Neb. 184. See Seager v. Cooley, 44 Mich. 14; Uhl v. Raw, 13 Neb. 357; Bergenn v. Richarlotte, 55 Wis. 129; Wrede v. Cloud, 52 Iowa, 371.

[17] Lubrick v. Stahle (Iowa, 1886), 27 N. W. Rep. 490; Hansen v. Berthelson (Neb., 1886), 27 N. W. Rep, 423-427; Weisberger v. Wisner (Mich., 1884), 21 N. W. Rep. 331; Gale v. Shillock (Dak., 1886), 29 N. W. Rep. 661; Chicago, etc. v. Boyd (Ill., 1886), 7 N. E. Rep. 487.

EXECUTORS AND ADMINISTRATORS — REMOVAL — NOTICE — SALE OF LANDS — ADEQUACY OF CONSIDERATION.

BOYD V. WYLY.

Supreme Court of United States, January 9, 1888.

1. *Executors and Administrators—Removal—Notice.*—Where, upon an application for the removal of an administrator, he was made a party defendant in the cause, and without filing an answer permitted a decree to be taken against him by default, and there was also found among the papers in this proceeding an "opposition," signed by the attorneys of the administrator: *Held*, that he was an actual party to the proceeding which resulted in his removal and that the appointment of a successor to continue the unfinished administration of the succession was valid.

2. *Same—Sale of Lands—Adequacy of Consideration.*—A Louisiana plantation was appraised and valued in 1860 at $119,393, and in 1866 at $95,645. It was appraised and sold in 1868 at an administrator's sale for $2,533: *Held*, that owing to the general depression in business and decline in value in the south at that time as a result of the war, this was not such an inadequacy of price as would furnish a presumption of fraud.

Appeal from the Circuit Court of the United States for the western district of Louisiana.

This is a bill in equity, filed in the circuit court of the United States for the western district of Louisiana on September 10, 1881, on behalf of Mary E. R. Boyd, wife of Frederick W. Boyd, by her son and next friend, James R. Boyd, citizens of Wisconsin, against William G. Wyly and Charles Egelly, of the parish of East Carroll, citizens of Louisiana, and to which, by an amendment, Frederick W. Boyd, of Wisconsin, was made an additional defendant, as dative testamentary executor of the last will of James Railey, late of Adams county, Mississippi. The bill avers that on February 1, 1860, James Railey, the father of the complainant, made his last will, and died in the summer of that year, leaving large estates in Mississippi, Arkansas, and Louisiana, which were disposed of by the will, bequeathing to the complainant a certain plantation in the parish of Carroll, Louisiana, known as the "Raleigh Plantation;" that James G. Carson was named in the will as executor; that the will was duly probated in the proper court of the parish of Carroll, and that Carson qualified according to law as executor, and took upon himself the burden of the execution of the will; that an inventory and appraisement of the property of the succession in

the parish of Carroll were made on December 12, 1860, and than the lands of said Raleigh plantation were valued at $119,393, which was the fair and reasonable value of the same; that thereafter, Carson having died, Frederick W. Boyd, the husband of the complainant, was duly appointed dative testamentary executor of said will, and qualified as such; and that on July 16, 1866, in due course of administration, he caused the said Raleigh plantation to be again inventoried and appraised as containing 1,935 acres at $55 per acre, making in the aggregate $95,645, which is alleged to be the fair and reasonable value of the same at that time. The bill further alleges that in July, 1868, the defendants Wyly and Egelly combined and confederated with Edward Sparrow and J. West Montgomery, attorneys at law, and with divers other persons, to defraud the complainant by procuring, under the forms of law, a sale to Wyly of the Raleigh plantation at a price far below its real value; that, to accomplish the said fraud, they took advantage of the temporary absence of Frederick W. Boyd, the dative testamentary executor, and instituted on July 16, 1868, proceedings in the parish court of Carroll parish to destitute him from his said office, and to procure the appointment of Egelly as administrator of the succession; that Boyd was not made a party to the proceedings, either personally or by the appointment of a *curator ad hoc* to represent him, and had no notice of the proceedings, nor of any subsequent proceedings resulting in the sale of the Raleigh plantation to Wyly until after the same had been consummated; that on the same day on which said preceedings to destitute Boyd of the executorship were instituted (merely upon the *ex parte* affidavit of Montgomery, one of the lawyers who had instituted the proceedings) judgment was rendered removing the executor from his office, and thereafter, on September 16, 1868, the defendant Egelly was appointed administrator of the succession, and gave bond as such, with his attorney, Montgomery, as surety. The bill further alleges that on the same day the proceedings for the destitution of the executor were instituted and ended; July 16, 1868, an order was obtained for a new inventory and appraisement of the property of the succession; and that the defendants Wyly and Egelly, in combination with Montgomery, caused such an inventory and appraisement to be made on September 4, 1868, by ignorant and incompetent appraisers, who corruptly and fraudulently appraised the value of the lands of the Raleigh plantation at the insignificant sum of $2,533.05. The bill further alleges that, under the pretext that it was necessary to sell the said plantation in order to pay debts of said succession to the amount of $46,000, of which $6,000 were alleged to be due to Sparrow & Montgomery, as attorneys of the estate, an order was obtained from the parish court for the sale of the same for cash, and that, after a single advertisement in an obscure paper, the plantation was, without the knowledge of the complainant or the said Frederick W. Boyd, on October 20, 1868, fraudulently adjudicated to Wyly for the said sum of $2,533.05, being at the rate of $1.50 per acre for the said lands. The bill further alleges that the fraudulent character of the transaction was well known to Wyly, who participated therein, and who thereby became a purchaser of the said plantation in bad faith, and should be held in equity to have acquired the legal title to the said Raleigh plantation in trust for the complainant, responsible to her from the date of his purchase for the rents and revenues thereof. The bill further alleges that, shortly after the adjudication of the plaintation to Wyly, he sued out in the proper court a process known to the law of Louisiana as a "monition," alleging that he was an innocent third party, who had purchased the plantation in good faith, praying for an adjudication of homologation of title, which was accordingly entered. The bill charges that, under the laws of Lousiana, said judgment of homologation of title extends only to the cure of defects of form, and not to the validation and ratification of acts of fraud and spoliation, such as are alleged to have infected the pretended purchase of said property by Wyly. The bill calls for answers, but not under oath, and prays for a decree declaring the pretended sale of the Raleigh plantation by the said Egelly to Wyly on October, 20, 1868, to be collusive, fraudulent, null, and void, and that Wyly was a purchaser thereof in bad faith, and that he be required to deliver possession thereof to the complainant, to account to her for the fruits and revenues thereof, and for general relief. The defendants Wyly and Egelly answered the bill, setting up various technical objections to its frame, in bar of the relief prayed, and also denying positively and circumstantially all allegations therein imputing or charging fraud in the sale and purchase of the said plantation. The cause was heard upon the pleadings and full proofs, when the court found that Wyly had acquired, by the proceedings referred to, a valid title to the property, without fraud in fact or in law on his part, and was entitled as a purchaser in good faith to the protection of the defense based upon the statutory prescription of ten years. The bill was accordingly dismissed, from which decree this appeal is prosecuted.

Mr. Justice MATTHEWS, after stating the facts as above, delivered the opinion of the court:

The first point raised in argument on the part of the complainant is as to the validity of the proceeding in the court of East Carroll parish, by which Frederick W. Boyd was, in the language of the Louisiana law, destituted of his office as dative testamentary executor, and the defendant Egelly substituted in his place. It is alleged in the bill, and insisted upon in argument, that this proceeding was had without any actual, and without any legal constructive, notice to Boyd, and that it is therefore null and void. It is charged, as a consequence, that Egelly became, not the rightful executor, but executor *de son tort*, and

that of this Wyly had notice imputed to him by law, because shown by the record. It is thence argued, as an inference reasonably to be deduced, that the proceeding must have been in pursuance of the fraud charged in the bill, and, taken in connection with the subsequent proceedings and their result, constitutes proof of the fraud charged.

It appears from a transcript of the record of the proceedings in question that on July 16, 1868, there was filed in the office of the parish court for the parish of Carroll a petition on behalf of certain creditors of the succession of James Railey, among whom are named Edward Sparrow and J. W. Montgomery, in which it is alleged that Frederick W. Boyd, after qualifying as dative testamentary executor in 1866, had leased out the plantation for one year, and cultivated it himself during the year 1867; that he had never filed any account of his administration, but had appropriated and used the rents and revenues of the estate for his individual benefit, without paying any of the creditors any portion of their just dues; that he had abandoned his administration, and had no domicile or residence in the State, and was permanently absent therefrom; that he had never given any sufficient bond for the faithfulness of his administration, the sureties thereon being insolvent, and had no property in the parish nor in the State, and that he had left no power of attorney authorizing any one to represent him in the management of the estate. The petitioners therefore prayed that the office of the said Boyd and the administration of the estate might be declared to be vacated and unrepresented; that Boyd be decreed to have abandoned his trust; and that, in order to protect the interest of the creditors, an administrator be appointed to finish the administration of the estate, and that Egelly be appointed thereto. This petition was signed on behalf of the petitioners by Sparrow and Montgomery as their attorneys, and was verified by the affidavit of Montgomery.

Among the papers on file in the matter of this proceeding in the parish court appears one styled "Opposition of F. W. Boyd," which is as follows: "To the Hon. Geo. C. Benham, Parish Judge in and for the Parish of Carroll, State of Louisiana: The petition of Frederick W. Boyd, a resident of the State of Mississippi, with respect shows that he is the duly appointed executor of the last will and testament of Jas. Railey, late resident of your said parish and State; that he had duly administered the property of the succession of the said Railey since his appointment and confirmation as executor under the will. Petitioner further shows that an application has been made to your honorable court praying that E. R. Egelly, Esq., be appointed dative testamentary executor of the said succession, notwithstanding your petitioner is acting as executor of the same. Wherefore your petitioner prays that the said application be rejected, and that the said applicant pay all costs of this proceeding, and for all general relief." This is signed by Goodrich, Pilcher & Montgomery, as attorneys. There are no official marks upon it showing the fact or date of its being filed. The testimony of Charles M. Pilcher, one of the firm who signed it, is that the document was written by him from a memorandum given to him by his partner Goodrich who was the member of the firm who had charge, during the administration of Boyd, of the business of the succession of the Railey estate. The witness states that the paper was prepared and filed, as he believes, on behalf of Boyd, by virtue of authority of the firm to act for him; and he states as his belief that when prepared and filed it was upon a full sheet of paper, upon the back of which the style of the case was noted, and on which would also be indorsed the fact and date of its being filed in court, and that the paper bears evidence of having been since mutilated by this half sheet being torn off. F. F. Montgomery, the only other surviving member of the firm whose name appears signed to the paper in question, was examined as a witness, and has no recollection of the paper nor of the transaction, but testifies that the document is in the handwriting of his partner Pilcher. Another witness, R. J. London, testified that he was deputy-clerk of the court at the time when these proceedings took place, and, having examined the document, stated that he believed it to be the original opposition of Boyd to the appointment of C. R. Egelly; that his impression is that marked "Filed," and put among the mortuary papers of the succession of James Railey by himself as deputy-clerk, though the part of the sheet upon which the title was written and the filing indorsed thereon seemed to have been torn off. The handwriting is that of Charles M. Pilcher. He says: "I know that an opposition was filed, and my impression is that the document marked 'B' is the one. The opposition I refer to was regularly filed and put away among the mortuary papers, as was customary in like cases."

Frederick W. Boyd was not called by the complainant as a witness, though he was a party defendant in the cause, having entered his appearance in person, but filed no answer, permitting a decree to be taken against him by default. If the facts were as alleged on behalf of the complainant, that this proceeding, by which he was removed from his office, was without notice to him, the fact could easily have been established by his oath. The allegations contained in the petition for his removal—that he had abandoned his duties and deserted his trust, as dative testamentary executor of the estate of Railey, and that he had no domicile or place of residence in the locality or in the State—are not denied by him, nor does he deny that the firm of Goodrich, Pilcher & Montgomery were authorized to oppose the application for his removal, and that they in fact appeared for him for that purpose. The conclusion, therefore, cannot be resisted that he was an actual party to the proceeding which resulted in his removal from his office as executor, and that the appointment of Egelly in his place, to

continue the unfinished administration of the succession, was valid.

The next point urged in support of the equity of the bill is that the sum at which the plantation was valued by the appraisers, and sold to the defendant Wyly, is so grossly inadequate, compared with the true value of the property, as to shock the conscience of the court, and to furnish full proof of the fraudulent means by which it was effected, and of the fraudulent motives and intent of the parties in effecting it. A large mass of testimony in the case bears upon this point. It is undoubtedly true that, compared with the previous appraisements of the property, and with its real value, prior to the breaking out of the civil war in 1861, the price at which the plantation was sold to Wyly appears grossly out of proportion, and several witnesses are called who do testify that the appraisement was below what it ought to have been when made, in 1868. On cross-examination, however, some of these very witnesses also show by their testimony that the standard in their own minds by which they test the fairness of the appraisement is their opinion of the intrinsic value of the property to hold and to use in reference to the future, and not the actual market value of the property at the time to be sold for cash. It also abundantly appears, from the evidence in the cause, that immediately at the close of the war, in 1865, and during that year and the following year, 1866, there were a great many speculative enterprises entered into by persons from the northern States investing large sums of cash capital in the cultivation of cotton plantations in the expectation of large profits. These expectations were not realized; on the contrary, almost universally they resulted in disaster; the pecuniary losses usually absorbing the entire amount invested. A reaction immediately set in, producing a corresponding depression in values. There was scarcely any cash capital in the country for investment. In addition to this, the labor of the country was disorganized as a result of the war, and of the political and social disorders which followed it. According to the proof in the case, this disorganization seemed so complete and so hopeless as to paralyze the business and industry of the community, and to lead quite a number to such a despair of the situation as to induce them to abandon the country in order to better their fortunes by emigration to Mexico and South America. The result of the testimony on this point is stated very moderately by the district judge, Boarman, in his opinion in this case, in the following extract (18 Fed. Rep. 355): "In the early years after the war, the testimony in this case affirms what is historically known to be true, that the section of the State in which the Raleigh plantation is situate was, by overflows and other physical and moral causes, almost entirely bereft of its old-time prosperity and value. The plantation was greatly damaged by previous overflows, and had but little fencing; and it is shown by defendant Wyly that he, shortly after purchasing it, expended $25,000 in improvements. Defendant has shown, whatever may have been the general causes that depreciated property on the Mississippi river in 1868, that many thousand acres of land, as valuable as the plantation in question, were sold for prices not unlike the paltry price at which Wyly bought his place. The testimony as to the scarcity of ready money, as to the price for which much valuable land sold when disposed of at forced sale, and as to the political, moral and physical bankruptcy of the country, leads me to believe that the complainant and the unpaid creditors of her father's succession were victims to the indifferent management and neglect of the executor, and to the physical and moral prostration of the country, which was apparent everywhere in Louisiana in the early years following the end of the war, rather than to the acts of any of these several defendants." The defendant Wyly took a more hopeful view, and, upon the basis of a well-grounded faith in the future of his country, he was willing to invest his money in real estate, abandoned by its owners, upon valuations made under the authority and with the sanction of the proper judicial tribunals of the locality.

We have examined with scrutiny and weighed with care all the evidence in this cause, and every consideration urged upon us by the zeal and ability of the counsel for the complainant, with a view to ascertain and secure to her her just rights. We are unable to discover any sufficient proof of the particulars of the fraud by which, as she complains, she has been wronged. The sale to the defendant Wyly, however advantageous it has proved to be to him, in our opinion, has not been impeached. The decree of the circuit court was, therefore, right, and is hereby affirmed.

NOTE.—It is a fundamental principle of law that no citizen shall be deprived of any right by judicial proceedings unless reasonable notice of the nature and object of the proceedings is given him.[1]

In accordance with this fundamental principle, it is generally held that no court has power to revoke letters of administration until the administrator is first cited to appear and show cause why the revocation should not be made, and an opportunity is given to defend himself.[2]

While it is generally held that notice to an administrator is necessary before he can be removed, it is not so certain what is sufficient notice to render the revocation of letters valid. Where[3] the administratrix appeared in the action brought to obtain her removal, and on her motion had the cause continued from day to day, and finally appeared and had a trial in the court, it was held that the question of the sufficiency of notice was immaterial, as her appearance in the action waived any right to notice. So where the record shows the appearance of the administrator in

1 Hanifan v. Needles, 108 Ill. 403.

2 Hostetter's Appeal, 6 Watts, 244; Wingate v. Wooten, 5 Smed. & M. 245; Delany v. Noble, 3 N. J. Eq. 559; Levering v. Levering, 64 Md. 399; Vale v. Vale, 37 N. J. Eq. 521; Bieber's Appeal, 11 Pa. St. 157; Morgan v. Dodge, 44 N. H. 255.

3 Ferris v. Ferris, 89 Ill. 452.

the circuit court in a trial *de novo*, it is considered that this recital of record which must be regarded as true obviates any objections taken because of the non-service of notice on him or his non-appearance in the circuit court.[4]

The appearance of the administrator in court, and submission of the matter to the court, is a waiver of the necessity of notice.[5]

It will be seen from these cases that any appearance of the administrator in the action brought for his removal, which gives him an opportunity to answer the charges against him, waives the necessity for notice. In Hanifan v. Needles,[6] in an action brought to remove an administrator, it was held that notice to him to appear and present his account of the administration was not sufficient to render his removal valid, since it did not contain the slightest intimation of the nature and object of the action, and in Gasque v. Moody[7] that service of notice upon counsel is insufficient notice for this purpose. Notice is particularly necessary when the action is brought to remove the administrator or executor on account of the insufficiency of his bond.[8] "It would be quite unjust and irregular that an executor who had been duly appointed and had filed a bond supposed to be proper and suitable, should be removed without notice and opportunity to file a new bond."[9]

Where the grant of administration to a public administrator was irregularly obtained by false allegations of fact and must be revoked, it is unnecessary to consider the question whether it is necessary to give him notice.[10]

Inadequacy of Consideration.—Mere inadequacy of price does not constitute *per se* a ground to avoid a bargain in equity.[11] "The reason for this rule is, that every person is entitled to dispose of his property in such manner as he chooses, and whether his bargains are wise and discreet or otherwise, or profitable or unprofitable, are considerations not for courts of justice, but for the party himself to deliberate upon."[12]

Where, however, the inadequacy of consideration is so great that it is impossible to state it to a man of common sense without producing an exclamation at its inequality, a court of equity considers that a sufficient proof of fraud to set aside the conveyance.[13]

No precise rule has been established what the disparity must be between the price paid and the value of the thing bought, in order to invalidate a contract on this ground; but courts of justice are left to apply the principles of equity to each case, according to its particular circumstances. Where the relief asked consists in rescinding or setting aside an executed contract, it is said that the inequality of price to be sufficient for this purpose must be so excessive as to be demonstrative of fraud. But where there are ingredients in the case of a suspicious nature or peculiar relations between the parties, gross inadequacy of price furnishes the most vehement presumption of fraud.[14]

In Butler v. Haskell,[15] the chancellor says: "The result of the cases seems to be that wherever the court perceives a sale of property to have been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong and, in general, conclusive presumption, though there be no direct proof of fraud that an undue advantage has been taken of the ignorance, the weakness, distress or necessity of the vendor, and this imposes upon the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct. And where there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness or any other cause, though not amounting to absolute disqualification, gross inadequacy of consideration for the conveyance is a circumstance from which imposition or undue influence will be inferred."[16]

In all of these cases equitable relief is granted, not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby.[17]

The same degree of inadequacy of consideration which will cause a court of equity to set aside a contract, will also authorize it to refuse its aid in enforcing the performance of such contract.[18]

It was held by Chancellor Kent, in Seymour v. Delancy [19] (the decree was afterwards reversed in 3 Cow. 183), that inadequacy of consideration in itself, and without fraud or other ingredient, was a sufficient ground to resist the specific performance of a contract when the inadequacy was so great as to render the bargain hard or unconscionable, and this opinion has been followed by some courts;[20] but the preponderance of authority is opposed to this distinction, and sustains the doctrine that "mere inadequacy of consideration, unconnected with any circumstance of unfairness, overreaching or oppression is no objection to enforcing the specific performance of a contract, when the parties stand upon an equality with equal means of information, and not in any confidential relation, and when no artifice is practiced."[21] In order that inadequacy of consideration may be a ground for equitable relief, it must exist at the time the contract was made. The fairness of the consideration is determined by the facts existing at the time the contract was made, and not by any subsequent events.[22]

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[4] Brown v. Weatherby, 71 Mo. 152; s. c., 10 Cent. L. J. 378.

[5] Wilson v. Hoss, 3 Humph. 142.

[6] 108 Ill. 403.

[7] 12 Smed. & M. 153.

[8] Morgan v. Dodge, 44 N. H. 255; Wingate v. Wooten, 5 Smed. & M. 244.

[9] Morgan v. Dodge, *supra*.

[10] Proctor v. Wanmaker, 1 Barb. Ch. 302.

[11] Griffith v. Spratley, 1 Cox, 383; Copis v. Middleton, 2 Maddox, 409; Tebbs v. Lee, 76 Va. 744; Bierer's Appeal, 92 Pa. St. 265; Eyre v. Potter, 14 How. 42; Park v. Johnson, 4 Allen, 259; Butler v. Haskell, 4 Desaus. 651; Seymour v. Delany, 3 Cow. 445; Bedel v. Loomis, 11 N. H. 9; Lee v. Kirby, 104 Mass. 428; Wintermute v. Snyder, 2 Green. Ch. 489; Cribbins v. Markwood, 13 Gratt. 495; Pom. Eq. Jur. § 926; Bispham's Eq. Jur. § 219.

[12] Eyre v. Potter, 14 How. 42.

[13] Gwynne v. Heaton, 1 Bro. C. C. 9; Heathcote v. Paignon, 2 Bro. C. C. 175.

[14] Morris v. Filliber, 30 Mo. 145.

[15] 4 Desaus. 697.

[16] Allore v. Sewell, 94 U. S. 506; s. c., 5 Cent. L. J. 19.

[17] Kerr on Fraud and Mistake, 161; Nelson v. Betts, 21 Mo. App. 219.

[18] Seymour v. Delancy, 3 Cow. 183; Low v. Treadwell, 3 Fairf. 441; Coles v. Trecothick, 9 Ves. 234; Lee v. Kirby, 104 Mass. 428.

[19] 6 Johns. Ch. 222.

[20] Campbell v. Spencer, 2 Binn. 133; Clitherall v. Ogilbie, 1 Desaus. 257.

[21] Harrison v. Town, 17 Mo. 237.

[22] Coit v. North Carolina, etc. Co., 14 Fed. Rep. 12; Lee v. Kirby, *supra*.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ADMIRALTY—Pleadings—Proof. —— A libel in admiralty founded on an express contract is not sustained by proof of a naked tort.—*Hays v. Pittsburgh, etc. Co.*, U. S. D. C. (Penn.), Jan. 13, 1888; 33 Fed. Rep. 552.

2. ADMIRALTY—Stipulation—Agent.—One who signs a stipulation for the value of the vessel, and thereafter defends the suit, is liable for interest on the face of the stipulation from its filing, though he acted as agent for an absent owner.—*The Maggie M.*, U. S. D. C. (N. Y.), Jan. 18, 1888; 33 Fed. Rep. 591.

3. ANIMALS—Running at Large—Punishment.——Under a city ordinance, the owner of a dog was ordered to produce it at the mayor's office to be killed. This was done, but the killing was prevented by an injunction. The mayor then sentenced the owner to twenty days' imprisonment: *Held*, that the sentence was void. —*State v. Vay*, S. C. La., Feb. 13, 1888; 3 South. Rep. 541.

4. APPEAL—Application to Divide Homestead.——An appeal by one of several defendants from an order directing a division of his homestead to satisfy the judgment, and from a refusal to remand the report of the appraisers for a report as to his life estate therein, is not a proceeding in the original action, nor such final judgment as to allow an appeal.—*Brown v. Starr*, S. C. Cal., Feb. 20, 1888; 16 Pac. Rep. 760.

5. APPEAL—Brief by Appellant.——When the appellant does not appear, and files no brief, the judgment will be affirmed.—*Scott v. Sowden*, S. C. Cal., Feb. 21, 1888; 16 Pac. Rep. 768.

6. APPEAL—Equity—Fact.——When the record in an equity appeal raises only a question of fact, the chancellor's findings will not be disturbed, unless they are clearly erroneous.—*Spivey v. Allman*, S. C. Ala., May 25, 1887; 3 South. Rep. 528.

7. APPEAL—Execution.——A plaintiff who has been put into possession by the sheriff under an execution sale, pending an appeal from the judgment upon which it was founded, cannot be regarded as illegally in possession.—*Pasley v. McConnell*, S. C. La., Dec. 19, 1887; 3 South. Rep. 485.

8. APPEAL—Final Decree—Want of Evidence.——An appeal will not lie from a decree of the district court dismissing a libel for want of evidence.—*The Delaware* U. S. C. C. (N. Y.), Dec. 13, 1887; 33 Fed. Rep. 589.

9. APPEAL—Judgment — Confession. —— An appeal will not lie from a judgment entered by confession in amicable action of ejectment, the record not showing that the judgment was entered by warrant of attorney. —*Appeal of Limbert*, S. C. Penn., Feb. 13, 1888; 12 Atl. Rep. 584.

10. APPEAL—Motion—Dismissal.——A motion to dismiss an appeal can only be based upon irregularities in the trial court or in the appellate court. It cannot be made for anything involving the merits.—*McConnell v. Pasley*, S. C. La., May 23, 1887; 3 South. Rep. 484.

11. APPEAL—Record—Bill of Exceptions.——When a deposition is not copied into the bill of exceptions, but is referred to and identified as being in the record in this court on a former appeal, an objection that the bill of evidence is not complete is not well taken.—*Jones v. Spradling*, Ky. Ct. App., Jan. 28, 1888; 7 S. W. Rep. 31.

12. APPEAL—Waiver.——Acquiescence by appellant in the judgment appealed from defeats the right of appeal.—*Church Wardens v. Perche*, S. C. La., Feb. 13, 1888; 3 South. Rep. 542.

13 ASSUMPSIT—Money Had—Conversion.—— An unauthorized withholding or conversion of property will not authorize a suit for money had and received, unless such party has sold the property, when the tort may be waived.—*Smith v. Jernigan*, S. C. Ala., Jan. 12, 1888; 3 South. Rep. 515.

14. ATTACHMENT—Appearance— Publication. —— An attachment is not void because the publication ordered was discontinued when the defendant appeared and consented that no further publication be made.—*Fuller v. Beck*, N. Y. Ct. App., Feb. 10, 1888; 15 N. E. Rep. 396.

15. ATTACHMENT—Levy—Return. —— An attachment is levied on land by indorsing it on the execution, and not by going on the land and stating that the officer levies on it. When an attachment was not returned for nearly a year, but the plaintiff's attorneys used due diligence to have it returned, the lien of the attachment was not forfeited.—*Riordan v. Button*, S. C. Tex., Nov. 18, 1887; 7 S. W. Rep. 50.

16. ATTORNEY—Admission to the Bar—Practice.—— Construction of New York rules of practice as to the admission of attorneys to the bar.—*In re Moore*, N. Y. Ct. App., Jan. 24, 1888; 15 N. E. Rep. 369.

17. BILLS AND NOTES— Collateral Security—Equities. ——When a promissory note is deposited as collateral security for an existing debt without any new consideration, it is subject to equities.—*Haden v. Lehman*, S. C. Ala., Jan. 13, 1888; 3 South. Rep. 528.

18. BILLS AND NOTES—Collateral Security—Equities.— Notes held as collateral security for a debt due from the payee are subject to equities as to the amount thereof beyond the debt for which they are pledged.—*Hatcher v. Independence Nat. Bank*, S. C. Ga., Feb. 6, 1888; 5 S. E. Rep. 111.

19. BILLS AND NOTES—Indorsement—Presumption.—— Where a negotiable note, payable some time after its date, is indorsed to the plaintiffs, it is a presumption of law that it was indorsed before maturity, and it is not subject to equities in such case.—*Hatcher v. National Bank*, S. C. Ga., Feb. 3, 1888; 5 S. E. Rep. 109.

20. BILLS AND NOTES—Payments after Maturity.—— A holder of a note who transfers it after maturity without notice to the maker, cannot hold such maker for payments made thereafter to his authorized agent.— *Quinn v. Dresbach*, S. C. Cal., Feb. 20, 1888; 16 Pac. Rep. 762.

21. BILLS AND NOTES—Place of Payment.——A promissory note, payable at a railroad station where there are several houses and stores, is not commercial paper, under Alabama laws.—*Haden v. Lehman*, S. C. Ala., Jan. 13, 1888; 3 South. Rep. 528.

22. BONDS—Municipal Aid—Subrogation.——Where a municipality issues its bonds for money authorized to be raised by a tax to aid a railroad, such bonds are not a payment of such tax, and the purchaser thereof is no

subrogated to the rights of the railroad against the municipality for the money voted to aid it.—*Ætna, etc. Co. v. Town of Middleport*, U. S. S. C., Feb. 6, 1888; 8 S. C. Rep. 625.

23. CARRIERS—Exemption from Liability—Fire—Burden of Proof.——Where cotton is transported under a bill of lading which exempts the carrier from liability for loss by fire, and the cotton is destroyed by fire, and a suit is brought against the carrier, the burden of proof of gross negligence, causing such fire, is upon the plaintiff.—*Platt v. Richmond, etc. Co.*, N. Y. Ct. App., Feb. 10, 1888; 15 N. E. Rep. 393.

24. CHATTEL MORTGAGE—Foreclosure — Intervenor — Death.——Where a chattel mortgage is sought to be foreclosed, and its foreclosure is opposed by the owner of real estate affected thereby, and he dies pending the proceeding, the action should be revived against his heirs; otherwise the mortgage cannot be foreclosed.—*Binkley v. Forkner*, S. C. Ind., Feb. 8, 1888; 15 N. E. Rep. 343.

25. CHATTEL MORTGAGE—Unplanted Crop.——A chattel mortgage of an unplanted crop does not authorize the mortgagee to sue in trover for its conversion, unless he had acquired possession of it, but he may sue in action on the case one who received and sold the crop with knowledge of the mortgage.—*Whittleshofer v. Strauss*, S. C. Ala., Jan. 16, 1888; 3 South. Rep. 524.

26. CLERK OF COURT—Election—St. Louis County.——A clerk of the county court of St. Louis county, under Acts Mo., 1877, p. 192, is elected at the general election in 1878 and every four years thereafter.—*State v. Matthews*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 17.

27. COLLISION—Dragging Anchor—Accident.——When a collision is caused by a ship dragging her anchor after lying still for eighteen days, which, as subsequently ascertained, was caused by a lost kedge wrapping around the chain, the accident must be ascribed to the peril of the sea.—*The Carl Frederick*, U. S. D. C. (Cal.), Dec. 5, 1887; 33 Fed. Rep. 589.

28. COLLISION—Rules of Navigation.——Vessels navigating the waters below the New York narrows are governed by the international rules of 1885.—*The Excelsior*, U. S. D. C. (N. Y.), Dec. 31, 1887; 33 Fed. Rep. 554.

29. COLLISION—Signals—Mutual Fault.—— When two boats approaching each other, signal, but neither fully complies with its signal, and a collision results, they are equally liable for the damages.—*The Manatee*, U. S. C. C. (Fla.), Jan. 9, 1888; 33 Fed. Rep. 585.

30. CONSTITUTIONAL LAW—Removal of Fence from Highway.——When a person has due notice, under the law, that a public road has been established over his premises, the penalties, under § 31, ch. 78, Comp. St., may be enforced against him for failure to remove his fences.—*Black v. Stein*, S. C. Neb., Feb. 8, 1888; 36 N. W. Rep. 548.

31. CONSTITUTIONAL LAW — Statute. —— Statutes of New York relating to the collection of taxes in certain counties construed, and *held* not to be in conflict with the constitutional provision of that State that requires all local laws to have but a single subject, and that subject to be expressed in the title.—*Ensign v. Barse*, N. Y. Ct. App., Jan. 24, 1888; 15 N. E. Rep. 401.

32. CONSTITUTIONAL LAW—Statute—Subject Expressed in Title.——Construction of Pennsylvania statutes relating to boroughs which are declared to be constitutional and consistent with that article of the Pennsylvania constitution which requires the subject of an act to be expressed in its title.—*Borough of Pottstown*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 573.

33. CONSTITUTIONAL LAW—Writ of Error—Interlocutory Judgment—Statute.——The statutes of New Jersey which provide that a writ of error shall lie upon an interlocutory judgment, as a question of granting a new trial, are unconstitutional.—*Dodd v. Lyon*, N. J. Ct. Err. & App., November, 1887; 12 Atl. Rep. 542.

34. CONSULS—Fees—Perquisites.——Fees received by a consul acting under State authority are his private property.—*United States v. Badeau*, U. S. D. C. (N. Y.), Dec. 20, 1887; 33 Fed. Rep. 572

35. CONTRACT — Builder's Contract — Arbitration — Pleading.——It is no defense to an action on a builder's contract that matters in dispute under it were by agreement to be submitted to arbitration, unless the answer shows that such submission to arbitration had been proposed by one party and rejected by the other.—*Johnston v. Varian*, N. Y. Ct. App., Feb. 10, 1888; 15 N. E. Rep. 413.

36. CONTRACT—Eminent Domain—Condemnation.—— Where a party has made a contract whereby she is bound, at the expiration of a lease, or upon the sale of the premises in question, to divide the value or proceeds thereof between certain parties: *Held*, that the condemnation of the land by right of eminent domain operated as a sale of the premises and the party was obliged to divide the proceeds accordingly.—*Vandermulen v. Vandermulen*, N. Y. Ct. App., Jan. 17, 1888; 15 N. E. Rep. 383.

37. CONTRACTS — Obligations — Alteration.——A municipal ordinance allowing a company to construct and maintain telephone lines on the streets for a consideration named, becomes, when acted on, a contract, and new terms and conditions cannot be afterwards required without the consent of the grantee.—*New Orleans v. Great, etc. Co.*, S. C. La., Feb. 13, 1888; 3 South. Rep. 533.

38. COPYRIGHT—Perforated Strips for Organettes.—— The manufacture and sale of perforated strips of paper to be used in organettes, and by which a certain tune is produced, is not a violation of the copyrighted sheet-music of the same tune.—*Kennedy v. McTammany*, U. S. C. C. (Mass.), Jan. 27, 1888; 33 Fed. Rep. 584.

39. CORPORATION — Manufacturing Company—Statute —Costs.——Construction of New York general manufacturing statutes; under it trustees are liable personally for debts if they fail to file the prescribed report: *Held*, that costs constitute a debt, under this statute.—*Allen v. Clark*, N. Y. Ct. App., Jan. 24, 1888; 15 N. E. Rep. 387.

40. COSTS—Payment—Attorney.——Where costs are improperly paid to an attorney, the court may, by summary order, direct the return of the money, if the attorney still has it in his possession.—*Forstman v. Schulting*, N. Y. Ct. App., Jan. 17, 1888; 15 N. E. Rep. 366.

41. COUNTIES—Corporations—Eminent Domain.——A county is a corporation in the sense that it is liable for injuries to the property of individuals consequent upon the construction of public works by the county.—*County of Chester v. Brower*, S. C. Penn., Jan. 9, 1888; 12 Atl. Rep. 577.

42. COUNTIES — Division—Property.——When a new county is organized out of a portion of an old county, the new county is not entitled to any of the funds of the old county nor subject to any of its obligations.—*Reeves County v. Pecos County*, S. C. Tex., Nov. 15, 1887; 7 S. W. Rep. 54.

43. COUNTY—Bridge — Railroad Company — Damages. ——Where county commissioners, authorized by the legislature, construct a bridge across a river, and the bridge is injured by the construction of a railroad passing under one of its arches, the commissioners cannot maintain an action for damages against the railroad company.—*Mahoning Co. v. Pittsburg*, S. C. Ohio, Nov. 22, 1887; 15 N. E. Rep. 468.

44. CRIMINAL LAW—Adultery.——A woman who is married by a proper officer to a man having another wife is not guilty of living in adultery, under Alabama law, unless she had knowledge of the former marriage or continues the cohabitation after acquiring the knowledge.—*Vaughn v. State*, S. C. Ala., Jan. 16, 1888; 3 South. Rep. 530.

45. CRIMINAL LAW — Burglary — Burial Vault.——A burial vault, built wholly above ground, is not a "building" within the penal code describing the crime of burglary in the third degree.—*People v. Richards*, N. Y Ct. App., Jan. 17, 1888; 15 N. E. Rep. 371.

46. CRIMINAL LAW—Evidence—Practice.——Where a defendant, prosecuted for murder and testifying on his own behalf, denies on cross-examination that he had

entered a certain person's house at night and repeated that denial on redirect examination: *Held*, that evidence to contradict these statements was inadmissible, the question being collateral to the issue.—*People v. Greenwall*, N. Y. Ct. App., Feb. 7, 1888; 15 N. E. Rep. 404.

47. CRIMINAL LAW—Indictment—Form—Indorsement. ——An omission to use the formal language of an indictment relative to the grand jury is not fatal, if the record shows it was found by a lawful grand jury in and to a court of competent jurisdiction. The omission of the foreman to indorse on it "a true bill" cannot be taken advantage of after verdict.—*State v. Brooks*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 24.

48. CRIMINAL LAW—Indictment—Record.——An omission by the clerk to copy into the record the indorsement of a true bill by the foreman on an indictment does not vitiate the indictment.—*State v. Herron*, S. C. Tenn., Feb. 23, 1888; 7 S. W. Rep. 37.

49. CRIMINAL LAW—Perjury—Jurisdiction of Court.—— A party can be indicted for false swearing in a criminal case before a justice of the peace, though the complaint, on which the information was based, was not sworn to.—*Anderson v. State*, Tex. Ct. App., Dec. 8, 1886; 7 S. W. Rep. 40.

50. CRIMINAL LAW—Perjury—Other Statements.—— On a trial for perjury, the State may show the falsity of defendant's statements regarding other and correlative facts.—*Anderson v. State*, Tex. Ct. App., Feb. 23, 1888; 7 S. W. Rep. 44.

51. CRIMINAL PRACTICE—Verdict—Responsiveness.—— A verdict of guilty of an assault with a dangerous weapon is not responsive to a charge of shooting with intent to commit murder.—*State v. Allen*, S. C. La., Feb. 13, 1888; 3 South. Rep. 537.

52. CUSTOMS DUTIES—Protest—Succeeding Firm.—— A prospective protest made by a firm as to its importations will not apply to importations made by a firm succeeding it.—*Sorchan a. Schell*, U. S. C. C. (N. Y.), Dec. 8, 1887; 33 Fed. Rep. 580.

53. DAMAGES—Water Used—Cost of Works.—— In an action by a city for the use of water, evidence of the cost of the water-works, as a basis of water-rates, is inadmissible.—*City of St. Louis v. Arnot*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 15.

54. DEDICATION — Riparian Rights—Filled-in Streets. ——A dedicated streets to a city, terminating at a river. The streets were filled in to high water by order of the legislature, which sold the filled-in part to B, who also acquired A's title: *Held*, that B had a good title to the filled-in part.—*City of Hoboken v. Pa. R. Co.*, U. S. S. C., Feb. 20, 1888; 8 S. C. Rep. 643.

55. DEED—Contingent Remainders—Assignment.—— A deed to one for life, with remainder to her children surviving her and to the representatives of those dead, creates a contingent remainder in the children, and a contingent remainder may be disposed of by a deed of assignment for the benefit of creditors.—*White v. White*, Ky. Ct. App., Jan. 28, 1888; 7 S. W. Rep. 26.

56. DEED—Possessory Title.——One who has been in exclusive possession of land described by marked boundaries, which by mistake was omitted from the deed of his grantor, can make a good deed to such land.—*Gaines v. Jones*, Ky. Ct. App., Jan. 12, 1888; 7 S. W. Rep. 25.

57. DEED—Quitclaim.——The grantee in a quitclaim takes subject to the equities between his grantor and a third person.—*Emmel v. Headlee*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 22.

58. DEMURRAGE — Consignee—Notice.——Demurrage will be allowed only after the lapse of a reasonable time after notice is actually given to the consignee, that the vessel is ready to unload.—*The Rocky City*, U. S. D. C. (Pa.), Dec. 23, 1887; 33 Fed. Rep. 556.

59. DIVORCE —Alimony—Remedies.——Except in extraordinary cases, only the provisions of § 4, ch. 25, Comp. St. will be resorted to for the enforcement of judgments in cases of alimony or maintenance.—*Segear v. Segear*, S. C. Neb., Feb. 8, 1888; 36 N. W. Rep. 536.

60. EASEMENT—Alley.——Where, in laying off a block of city lots, the proprietor has dedicated an alley for the use of those lots for general purposes, the holder of one of the lots may lay sewer-pipes across the alley.—*Appeal of McElhone*, S. C. Penn., Feb. 13, 1888; 12 Atl. Rep. 564.

61. EJECTMENT — Adverse Possession — Color of Title. ——Where a party sells part of a tract, but the vendee fails to complete the purchase and abandons it, and the widow of the vendee subsequently in an action of ejectment for the whole tract defends claiming title to the whole tract, such facts show possession by the widow of the part sold under color of title.—*Hickman v. Link*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 12.

62. EJECTMENT—Condition Subsequent.——Failure to comply with a condition subsequent in a deed does not alone divest the title of the grantee, and the grantor may maintain ejectment against him.—*O'Brien v. Wagner*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 19.

63. EJECTMENT—Equitable Title.——Plaintiff in ejectment as agent sold the land, accidentally omitting the lot in controversy. Defendant bought and improved the lot, believing it was included in the deed. Plaintiff, discovering the omission, obtained a deed and brought ejectment: *Held*, that defendant's title was good.—*Meeker v. Dalton*, S. C. Cal., Feb. 20, 1888; 16 Pac. Rep. 764.

64. EJECTMENT — Former Judgment.——In Missouri, a judgment in ejectment is no bar to a second action for the same property between the same parties, whether titles and defenses in both actions be the same or not.—*Avery v. Fitzgerald*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 6.

65. EJECTMENT—Limitations—Adverse Possession—Instruction.——In ejectment an instruction to the jury is erroneous as withdrawing the whole question of adverse possession from the jury, if it states that they should find for the defendant if it appeared to them from the evidence, that the defendant's grantee had acquired color of title, and then for more than ten years defendant and his grantor claimed said land and remained during that time in actual possession of the land and that such claim of title was notorious.—*Woods v. Montevallo, etc. Co.*, S. C. Ala., Jan. 4, 1888; 3 South. Rep. 475.

66. EMINENT DOMAIN — Damages. —— In estimating compensation for property damaged for public use, benefits shared by the public at large cannot be considered, but benefits special to the property damaged may be.—*Schaller v. City Omaha*, S. C. Neb., Feb. 8, 1888; 36 N. W. Rep. 533.

67. EQUITY—Parties—Creditor.——Where one is *bona fide* engaged in litigation claiming title to property, his simple contract creditor cannot intervene in the suit or be heard with reference thereto.—*Postal, etc. Co. v. Snowden*, Md. Ct. App., Dec. 16, 1887; 12 Atl Rep. 549.

68. EQUITY—Pleading—Answer,——Where the allegation of a bill in equity is that defendant had violated a written agreement, and the answer is that by a parol agreement made at the same time she had a right to do so, the answer is not responsive to the bill, and the burden of proof to establish the parol agreement is upon the defendant. — *Appeal of Kenney*, S. C. Penn., Feb. 20, 1888; 12 Atl. Rep. 589.

69. EQUITY — Pleading — Multifariousness. ——A bill filed for specific performance of a contract for the sale of land, wherein the complainant had equities prior to the contract, is not multifarious for joining the wife of the contracting party, who had received from her husband a voluntary conveyance of the land prior to the contract with knowledge of the complainant's equities.—*Barry v. Barry*, S. C. Miss., May 2, 1887; 3 South. Rep. 532.

70. EQUITY—Specific Performance.—— Circumstances stated under which a party who has agreed to the exchange of land, but failed for six weeks to comply with his engagements, is not entitled to a decree for specific performance.—*Appeal of Alexander*, S. C. Penn., Feb. 13, 1888; 12 Atl. Rep. 580.

71. ERROR — Writ of Error —Limitation.——A writ of error must be brought in Ohio within two years after

the rendition of the judgment complained of, and all persons who may be affected by that judgment must be made parties to the action. If not brought within that time the writ of error will be barred.—*Burke v. Taylor*, S. C. Ohio, Nov. 22, 1888; 15 N. E. Rep. 471.

72. ERROR, WRIT OF—Description of Judgment.——When the citation in error does not describe the judgment as it is described in the petition in error, as required by Texas law, the suit will be stricken from the docket and another citation issued.—*Crane v. Hogan*, S. C. Tex., Dec. 13, 1887; 7 S. W. Rep. 57.

73. EVIDENCE—After Suit Brought—Ejectment.——It is error in ejectment to admit in evidence a deed made after suit brought in order to correct a mistake in description in a prior deed.—*Green v. Jordan*, S. C. Ala., Jan. 11, 1888; 3 South. Rep. 513.

74. EVIDENCE — Constable's Deed — Judgment. —— When in an action to recover possession of real property defendant claims under a constable's deed, such deed is not admissible without proof of the judgment and execution. —*Peterson v. Weissbein*, S. C. Cal., Feb. 21, 1888; 16 Pac. Rep. 769.

75. EVIDENCE — Insurance — Renewal. —— Where a party desiring to renew a policy of insurance mentions the subject to the clerk of the insurance agent and receives no reply whatever, the silence of the clerk is no evidence one way or the other as to the liability of the insurance company.—*Royal, etc. v. Co. Beatty*, S. C. Penn., Feb. 20, 1888; 12 Atl. Rep. 607.

76. EVIDENCE — Res Gestæ — Divorce. —— Circumstances stated under which cruel treatment may be given in evidence as part of the *res gestæ* in a divorce case.—*Passmore v. Passmore*, S. C. Ind., Feb. 7, 1888; 15 N. E. Rep. 338.

77. EXECUTION—Distribution of Proceeds.——In proceedings to distribute funds in the hands of a sheriff arising from a sale, all claims thereto must be considered together and in one judgment.—*Citizens' Bank v. Tureaud*, S. C. La., Feb. 13, 1888; 3 South. Rep. 538.

78. EXECUTION — Return — Sufficiency.——A sheriff's return upon an execution described the land by reference to the deed made by him, wherein it was properly described: *Held*, sufficient.—*Traylor v. Lide*, S. C. Tex., Dec. 20, 1887; 7 S. W. Rep. 58.

79. EXECUTOR—Bond—Illegal Consideration—Partnership. —— Where a surviving partner exacted from the executor of the deceased partner a bond conditioned that the executor should keep secret certain transactions of the late firm, and required a deposit to secure the payment of the bond: *Held*, that the exaction of the bond was illegal, that the bond was void for want of consideration, and that the executor could recover the desposit. — *Zimmerman v. Kinkel*, N. Y. Ct. App., Feb. 7, 1888; 15 N. E. Rep. 407.

80. EXECUTOR — Public Administrator —Appointment. ——Under the act of 1870, No. 87, the public administrator cannot be appointed to the succession of a party dying intestate, when his heirs are present or represented and are in possession of the property left by him.—*Succession of Smith*, S. C. La., Feb. 13, 1888; 3 South. Rep. 539.

81. EXEMPTION — Claim — Trial. —— Under Alabama law, where the plaintiff in a contest to try the right to exemptions claimed has failed to give the statutory notice, which the defendant refuses to waive, upon the failure of plaintiff to appear at such trial nonsuit may be granted against him but not a judgment.—*McAbee v. Parker*, S. C. Ala., Jan. 9, 1888; 3 South. Rep. 521.

82. FEES — Sheriff — Mileage. —— A sheriff served eighteen citations on a defendant at the same time, going to M and delivering them to his deputy, who served them near M and mailed them to the county-seat: *Held*, that the sheriff, under Texas laws, could charge mileage in each case, including the return from M to the county-seat.—*Gulf, etc. R. Co. v. Dawson*, S. C. Tex., Jan. 24, 1888; 7 S. W. Rep. 63.

83. FORCIBLE ENTRY AND DETAINER — Plea—Adverse Possession.——A plea of not guilty in an action of forcible entry and detainer, obliges the plaintiff to prove every fact. The building of a few rods of fence, and cultivating a few brush or plowing a few furrows, are not such acts of possession as will enable the party to maintain an action of forcible entry and detainer against one who has been in possession for more than a year under a lease from an adverse claimant.—*Gallahger v. Connell*, S. C. Neb., Feb. 15, 1888; 36 N. W. Rep. 566.

84. FRAUD—Corporation. ——Where one buys a business of manufacturing and transfers it to nominal corporation of which he is the president, the assets of such corporations so transferred by him are liable for his debts.—*Van Campen v. Ingram*, N. J. Ct. Chan., Feb. 16, 1888; 12 Atl. Rep. 537.

85. FRAUD — Execution —Supplementary Proceedings. —— Where one to defraud a creditor and avoid the performance of a contract has sold his whole estate and full evidence of his fraud appears, he will be required by decree to perform his contract and pay the money. — *Logan v. O'Leary*, N. J. Ct. Chan., Feb. 14, 1888; 12 Atl. Rep. 535.

86. FRAUD—Fraudulent Representations. —— Where plantiff and defendant agreed to rent premises from a third person with whom the defendant makes contract, and afterward represents to plaintiff that the rent agreed upon is $100 a month, and plaintiff continues to pay her half of that sum until she discovers that the real rent is only $65 a month: *Held*, that the recital of these facts constitute a statement of a good cause of action.—*Du Sonchet v. Dutcher*, S. C. Ind., Feb. 7, 1888; 15 N. E. Rep. 459.

87. FRAUDS—Statute of — Realty—Part Performance. ——A and B had judgments against each other, and on execution each bought the other's land, and it was subsequently agreed that each should retain his land upon A's paying B's judgment. A did so and kept his land but received no deed: *Held*, that there was part performance, taking the case out of the statute of frauds. —*Simmons v. Headlee*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 20.

88. FRAUDULENT CONVEYANCE — Evidence.——Circumstances stated under which it is a question for the jury whether a fraudulent combination between the vendor and vendee of property to defeat the creditors of the vendor, and in such case evidence of the declaration of either in the absence of the other is admissible against both.—*Lowe v. Dalrymple*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 567.

89. FRAUDULENT CONVEYANCES—Possession—Declarations.——In an action to set aside a levy on lands bought by one claiming under a conveyance from the debtor, who was found in possession at the time of the levy, the declarations of the latter tending to show that he had put his property out of his hands so that his creditors could not reach it are admissible.—*Rutledge v. Hudson*, S. C. Ga., Nov. 29, 1887; 5 S. E. Rep. 93.

90. GIFT—Land — Specific Performance.——A gift of land by parol by a father to his son, followed by valuable improvements thereon by the donee, will not pass the legal title; a decree of specific performance must be obtained.—*Howell v. Elsberry*, S. C. Ga., Jan. 23, 1888; 5 S. E. Rep. 96.

91. HEIR—Liability of—Ancestor's Debt.——The liability of a heir for the debt of his ancestor is a legal liability enforceable by an action at law.—*Mutual, etc. Co. v. Hopper*, N. J. Ct. Chan., Feb. 9, 1888; 12 Atl. Rep. 528.

92. HOMESTEAD—Deed—Sale.——In Missouri, in ejectment brought by a purchaser at execution sale, the defendant cannot rely for his homestead rights on a deed made and filed after the sale.—*Tennant v. Pruitt*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 23.

93. HOMESTEAD—Judgment—Levy.——A levy made by a judgment creditor on a homestead creates a lien, which takes precedence of a mortgage subsequently executed, there being no laches in obtaining and enforcing the lien, under Arkansas law.—*Brandon v. Moore*, S. C. Ark., Feb. 4, 1888; 7 S. W. Rep. 36.

94. HOMESTEAD—Judgment—Waiver. ——A claim of homestead exemption by a wife is waived, if not interposed till after judgment in a suit for necessary family supplies, where an order to sell the homestead is incorporated in the judgment.—*Stanley v. Ehrman*, S. C. Ala., Jan. 23, 1888; 3 South. Rep. 527.

95. HOMESTEAD—Mortgage — Sale.——The lien of a mortgage creditor upon lands set apart as a homestead exemption to his debtor under his bankruptcy, is not divested by a sale of the premises by the debtor's administrator under order of the court of ordinary.—*Barrett v. Durham*, S. C. Ga., Dec. 19, 1887; 5 S. E. Rep. 102.

96. HOMESTEAD — New Constitution.——When one holds a homestead under the constitution of 1868, a new and independent homestead set apart to him under the constitution of 1877 is a nullity.—*First N. Bank v. Massengill*, S. C. Ga., Dec. 16, 1887; 5 S. E. Rep. 100.

97. HOMESTEAD — Sale.——Homestead property set apart to the head of a family can only be sold under the conditions prescribed in the constitution, so long as the family exists as a family of this State.—*Hart v. Evans*, S. C. Ga., Nov. 22, 1887; 5 S. E. Rep. 99.

98. HOMESTEAD—Sale—Proceeds.——In South Carolina, the sale of a homestead on execution is absolutely void, and the claimant of the homestead cannot claim a homestead in the proceeds of such sale.—*Ross v. Bradford*, S. C. S. Car., Feb. 11, 1888; 5 S. E. Rep. 84.

99. HUSBAND AND WIFE—Carrying on Business.——A married woman may carry on business and make contracts as though she were unmarried.—*Shortel v. Young*, S. C. Neb., Feb. 15, 1888; 36 N. W. Rep. 572.

100. HUSBAND AND WIFE — Community Property — Rights of Heirs.——When a husband mortgages community property to secure community debts and a debt contracted after the death of the wife, which property is purchased on foreclosure by the mortgagee, the heirs of the wife, in a suit to quiet their title, must pay their share of the community debts, less their share of the rents and profits.—*Johnston v. Sav. L. S. Union*, S. C. Cal., Feb. 18, 1888; 16 Pac. Rep. 753.

101. HUSBAND AND WIFE — Foreign Law — Presumptions.——In Arkansas, it is a presumption of law in the absence of evidence, that the husband's rights in property acquired by his wife in another State are governed by the common law.—*Thorn v. Weatherly*, S. C. Ark., Feb. 4, 1888; 7 S. W. Rep. 33.

102. INFANCY—Conveyance—Avoidance.—— When an infant sues to set aside her deed, equity can require her to do equity, and may leave the property with the grantee and decree other property to her.—*Kerr v. Kerr*, S. C. App. Va., Dec. 1, 1887; 5 S. E. Rep. 89.

103. INJUNCTION—Pending Suit — Solvency.——When plaintiff claims he has a right of way by deed over defendant's land, it is not error to refuse an injunction against interference, when defendant has a suit to correct the deed and is able to pay damages.—*Georgia S. Co. v. Davitt*, S. C. Ga., Jan. 9, 1888; 4 S. E. Rep. 875.

104. INSURANCE—Agents — Licenses.—— An insurance agent is only an intermediary between the insured and the company he represents. He is different from a person, firm or corporation doing an insurance business, and he is liable for the license exacted by law from the latter.—*State v. Woods*, S. C. La., Feb. 13, 1888; 3 South. Rep. 543.

105. INSURANCE — Representations — Warranty.—— When a warranty is given, which is false, either by mistake or wilfully, the insurance company is relieved on its policy of insurance, but representations made have that effect only when wilfully, erroneous or grossly negligent.—*Fisher v. Crescent I. Co.*, U. S. C. C. (N. Car.), November Term, 1887; 33 Fed. Rep. 544.

106. INSURANCE—Warranty — Representations.——In the absence of fraud or gross negligence a policy of insurance is not vitiated by incorrect representations, though the application states that he has made known all the circumstances so far as known to him, and that such statements are made a condition of the insurance and a warranty by the insured.—*Fisher v. Crescent I. Co.*, U. S. C. C. (N. Car.), December Term, 1887; 33 Fed. Rep. 549.

107. INTEREST — Depositions — Courts. ——A State depositary must pay on court deposits the interest fixed by law, unless the court varies it.—*Nat. Bk. of Rutland v. Hankinson*, U. S. C. C. (N. Y.), Jan. 26, 1888; 33 Fed. Rep. 561.

108. INTOXICATING LIQUORS—License—Revocation.—— When a party is convicted of a violation of law connected with the sale of liquors in a city of the first-class, and his conviction has been certified to the city authorities, his license may be revoked by resolution of the city authorities by resolution without notice to him, and the act authorizing it is constitutional.—*Martin v. State*, S. C. Neb., Feb. 8, 1888; 36 N. W. Rep. 554.

109. JUDGMENT—Collateral Attack—Presumption.—— When an order of publication was made January 25, where three weeks were required for publication, and judgment was rendered February 22 before a justice of the peace, in a collateral proceeding the service must be considered to have been properly made. In collateral proceedings any presumption should be in support of judicial acts.—*Traylor v. Lide*, S. C. Tex., Dec. 20, 1887; 7 S. W. Rep. 58.

110. JUDGMENT—Contract — Statute.——A judgment, whether founded on tort or contract, is a contract, within the meaning of the New York Code of Civil Procedure, and in an action upon a foreign judgment, it is not necessary to state the ground upon which that judgment was founded.—*Gutta-percha and Rubber, etc. Co.*, N. Y. Ct. App., Jan. 24, 1888; 15 N. E. Rep. 402.

111. JUDGMENT—Default—Striking Off—Pleading Over. ——Where a judgment by default was rendered, and the defendant the next day filed an answer to which the plaintiff filed a replication, and the case was tried upon its merits, the judgment by default was afterwards properly set aside.—*City of Philadelphia v. Coulston*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 604.

112. JUDGMENTS—Sureties—Agreements.——When an indorser confesses judgment on the agreement of his principals to procure other security, and to obtain a like judgment from another indorser, he is liable thereon, though the principal does not fulfill his agreement.—*Kelly v. Taliafem*, S. C. App. Va., Jan. 20, 1888; 5 S. E. Rep. 85.

113. JUDGMENT—Res Adjudicata.——Where an action is brought against a city and its servants, and the joint answer sets up a former judgment against the city only, a demurrer to the answer cannot be sustained, because the city is the real party and its servants only nominal parties.—*Foust v. City of Huntington*, S. C. Ind., Jan. 25, 1888; 15 N. E. Rep. 337.

114. JUDGMENT—Res Adjudicata—Quieting Title.—— In an action for quieting title the rights of all parties claiming title to the property may be adjudicated, and the judgment in such a case is *res adjudicata* as to all parties to the action.—*Indiana, etc. Co. v. Allen*, S. C. Ind., Feb. 14, 1888; 15 N. E. Rep. 451.

115. JURISDICTION—Service—Non-residents.—— When, in a personal action for damages sustained in a foreign country, personal service is had on a defendant, it is error to dismiss the action, though plaintiff and defendant are aliens.—*Roberts v. Dunsmeier*, S. C. Cal., March 1, 1888; 16 Pac. Rep. 782.

116. JURISDICTION—Waiver—Court of Claims.——One who institutes proceedings in the court of claims for damages for lands taken for public purposes, cannot allege that the law establishing the court is unconstitutional.—*Great F. M. Co. v. Garland*, U. S. S. C., Feb. 6, 1888; 8 S. C. Rep. 631.

117. LANDLORD AND TENANT—Surrender to Another—Justice of the Peace—Title.——A lessee cannot by surrender to another deprive his landlord of his right to the possession. A justice of the peace may receive deeds in connection with other evidence to see who is entitled to the possession of real estate.—*Gallagher v. Connell*, S. C. Neb., Feb. 15, 1888; 36 N. W. Rep. 566.

118. LIMITATIONS — Creditors.——Creditors are never

barred by lapse of time while the law itself hinders them from proceeding.—*Hart v. Evans*, S. C. Ga., Nov. 22, 1887; 5 S. E. Rep. 99.

119. LIMITATIONS—Suspension of Limitations—Administrator.——The presentation of a claim to an administrator after he has initiated proceedings to declare the estate insolvent, suspends the running of the statute of limitations.—*Smith v. Crater*, N. J. Ct. Err. & App., Feb. 11, 1888; 12 Atl. Rep. 530.

120. MALICIOUS PROSECUTION — Evidence. —— In an action for malicious prosecution, evidence of improper treatment of plaintiff while in prison is not admissible against the defendant, who had no control over the public officials in whose custody the plaintiff had been placed.—*Zebley v. Storey*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 569.

121. MALICIOUS PROSECUTION—Evidence—Province of Jury—Construction.——Where, in an action for malicious prosecution, the evidence of want of probable cause is pretty evenly balanced, it is the duty of the jury to weigh the evidence, and an instruction that they should find for the defendant is properly refused.—*Acker v. Gundy*, S. C. Penn., Feb. 20, 1888; 12 Atl. Rep. 595.

122. MARRIED WOMAN — Mortgage — Estoppel. —— Where a married woman purchases property and gives her note therefor, with a mortgage on her own property to secure the payment of the note, and an affidavit that the note and mortgage were executed by her for the property purchased by her: *Held*, that such note and mortgage can be enforced against her by an innocent purchaser thereof without notice of any defense, although she may show that the affidavit was obtained from her by the fraud and collusion of her husband and the payee of the note.—*Lane v. Schlemmer*, S. C. Ind., Feb. 15, 1888; 15 N. E. Rep. 454.

123. MASTER AND SERVANT — Negligence — Contributory.——A car of unusual height was in a train, and a brakeman, while standing on it, was killed by being struck by a bridge. Several persons were looking on, but gave no warning, seemingly apprehending no danger: *Held*, that the question of negligence was for the jury.—*Stirk v. Central, etc. Co.*, S. C. Ga., Jan. 30, 1888; 5 S. E. Rep. 105.

124. MASTER AND SERVANT—Negligence—Control.—— When, to obtain a foundation, a neighboring wall is undermined, the work being done under the direction of a supervising architect, subject to the control of the owner, the latter is liable for injuries to a workman caused by the negligent performance of the work.—*Campbell v. Lunsford*, S. C. Ala., Jan. 13, 1888; 3 South. Rep. 522.

125. MASTER AND SERVANT—Negligence—Seaman.—— Where a seaman, while at the wheel, owing to a heavy sea, is thrown over the wheel and injured, the ship is not liable, in the absence of negligence on its part and no faulty construction of the wheel being shown.—*The Harry Buschman*, U. S. D. C. (N. Y.), Jan. 16, 1888; 33 Fed. Rep. 558.

126. MECHANIC'S LIEN—Enforcing.——A mechanic's lien, in Arkansas, for work in moving and repairing a saw mill cannot be enforced against lumber manufactured in the mill.—*Russell v. Painter*, S. C. Ark., Feb. 4, 1888; 7 S. W. Rep. 35.

127. MECHANIC'S LIEN—Legal Title—Equitable Title.—Where N, holding the equitable title to land of which K holds the legal title, contracts a liability for building materials, and afterwards defendant buys the legal title before the mechanic's lien is filed, he is not liable for such materials.—*Weaver v. Sheeler*, S. C. Penn., Feb. 13, 1888; 12 Atl. Rep. 558.

128. MECHANIC'S LIEN — Time of Filing. ——Under Kansas laws, a mechanic's lien is not valid if filed before the completion of the building, unless work thereon is abandoned. —*Catlin v. Douglass*, U. S. C. C. (Kan.), November, 1887; 33 Fed. Rep. 569.

129. MINES—Location — Execution — Publication.—— After publication in an application for a patent and payment for the land, no adverse interest can be considered, and such party is the owner of the land. One purchasing his title under a constable's sale during publication, at most receives a quitclaim and must adverse to protect his interest, otherwise the original party may go on and obtain a patent, which does not pass by such sale.—*Hamilton v. Southern, etc. Co.*, U. S. C. C. (Nev.), Dec. 23, 1887; 33 Fed. Rep. 562.

130. MORTGAGE—Action to Set Aside—Proceeds.—— When an action is brought to set aside a mortgage and subject land to a judgment, and a cross-bill is filed asking that the land be sold, to satisfy the mortgage, a decree in favor of the cross-bill should order that the excess of the proceeds beyond the mortgage be applied on the judgment.—*Simpkinson v. Sanders*, Ky. Ct. App., Feb. 4, 1888; 7 S. W. Rep. 32.

131. MORTGAGE—Judgment—Priority—Notice. ——An unrecorded mortgage given by an ancestor has priority over a judgment recovered against his heir during the life-time of the ancestor, although the plaintiff in the judgment had no notice of the mortgage.—*Voorhis v. Westervelt*, N. J. Ct. Err. & App., Feb. 11, 1888; 12 Atl. Rep. 533.

132. MORTGAGE—Payment.——Where, by the terms of a mortgage, one-half of the money arising therefrom is to be paid to J after the death of S, the other half to be paid to certain minor children as they should respectively arrive at full age: *Held*, that a payment of the whole amount to J was unauthorized. —*Waterman v. Webster*, N. Y. Ct. App., Jan. 17, 1888; 15 N. E. Rep. 380.

133. MORTGAGE — Receiver — Foreclosure.——Where the creditor of a corporation, holding a mortgage upon its property, files a bill to foreclose the mortgage, making the receiver a party defendant to the bill, he cannot object to the answer of the receiver, which impugns the validity of the mortgage, on the ground that he, the receiver, has no interest in himself to justify such a defense.—*Ryan v. Anglesea, etc. Co.*, N. J. Ct. Chan., Feb. 16, 1888; 12 Atl. Rep. 539.

134. MUNICIPAL CORPORATION—Defective Sidewalk.—— A city is not liable for a defective sidewalk which is not within the limits of the street but on private ground, unless the city has notice of the dangerous condition of that sidewalk and fails to erect any barrier indicating the true limit of the street.—*Jewhurst v. City of Syracuse*, N. Y. Ct. App., Feb. 7, 1888; 15 N. E. Rep. 409.

135. MUNICIPAL CORPORATIONS — Eminent Domain — Statutes. ——Construction of Pennsylvania statutes relative to the widening of Chestnut street of Philadelphia by the corporation of that city by right of eminent domain.—*In re Chestnut Street*, S. C. Penn., Feb. 13, 1888; 12 Atl. Rep. 585.

136. MUNICIPAL CORPORATIONS—Statute—Railroad.—— Construction of New York statutes relative to railroad tracks, turnpikes and the powers of municipal corporations relative thereto.—*City of Albany v. Watervliet, etc. Co.*, N. Y. Ct. App., Jan. 17, 1888; 15 N. E. Rep. 370.

137. NEGLIGENCE.——It is negligence for the driver of a vehicle, trotting up a grade of a street and looking backward instead of forward, to drive over a child seven years old who was crossing the street. —*Moehus v. Hermann*, N. Y. Ct. App., Feb. 10, 1888; 15 N. E. Rep. 415.

138. NEGLIGENCE—Constructions.——In an action for negligence implicating the respective drivers of two street cars, it is prejudicial error for the court in its instructions to intimate that one is without fault and that the other has been guilty of negligence.—*Black v. Brooklyn, etc. Co.*, N. Y. Ct. App., Feb. 7, 1888; 15 N. E. Rep. 389.

139. NEGLIGENCE—Damages—Opinion.——The doctrine of comparative negligence is unknown in Missouri. A question to the plaintiff as to the damages he thinks he has sustained by an injury to his minor child, considering the value of his services to his twenty-first year, should be excluded.—*Hurt v. St. Louis, etc. R. Co.*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 1.

140. NEGLIGENCE — Defective Premises.——Where a party makes an opening along a pavement and puts up a rail to keep parties from falling into it, it is his duty to keep such rail in good condition, and he is liable to one

injured by leaning against it and falling into the hole by reason of its giving away.—*Hotel Assn. v. Walters*, S. C. Neb., Feb. 8, 1888; 36 N. W. Rep. 561.

141. NEGLIGENCE—Druggist.——Where a druggist or his servant negligently furnishes a deadly drug in lieu of a harmless medicine, and death ensues in consequence, the druggist is liable in damages for such negligence.—*Davis v. Guarnieri*, S. C. Ohio, Dec. 13, 1887; 15 N. E. Rep. 350.

142. NEGLIGENCE—Evidence.——A railroad company is not liable in damages to an employee who falls into a ditch while engaged in work, and whose horses draw his roller over him.—*Kelly v. Manayunk, etc. Co.*, S. C. Penn., Feb. 20, 1888; 12 Atl. Rep. 598.

143. NEGLIGENCE—Loss of Property by Fire.——Circumstances stated under which it was held to be a question for the jury whether a fire which destroyed the property involved was caused by sparks from an east-bound train or from a west-bound train.—*Tanner v. New York, etc. Co.*, N. Y. Ct. App., Jan. 17, 1888; 15 N. E. Rep. 379.

144. NEGLIGENCE—Master and Servant.——A servant who after learning that a noxious vapor is escaping into a room in which he is at work assumes all the risks arising from that fact.—*Beittenmiller v. Bergner*, S. C. Penn., Feb. 20, 1888; 12 Atl. Rep. 599.

145. NEGOTIABLE PAPER—Indorsement—Accommodation Indorser.——An accommodation indorsement is a general loan of the credit of the indorser, but a special agreement may be made by which it becomes a special loan, and if the note is used for any other purpose the indorser will be released. *Quære.*—*Cozens v. Middleton*, S. C. Penn., Feb. 13, 1888; 12 Atl. Rep. 566.

146. NEGOTIABLE PAPER—Transfer Before Maturity.——Where one transfers a promissory note before maturity, in payment of an antecedent debt to a creditor who has no notice of any defense to it, the creditor can recover on the note.—*Hart v. United States, etc. Co.*, S. C. Penn., Feb. 13, 1888; 12 Atl. Rep. 561.

147. NOTARY PUBLIC—Negligence—Damages.——In an action against a notary for neglect in taking the acknowledgment of a mortgage of a crop, when it appears that the crop was worthless, not even nominal damages can, under the code, be recovered.—*McAllister v. Clement*, S. C. Cal., Feb. 25, 1888; 16 Pac. Rep. 775.

148. NUISANCE—Abatement—Estoppel.——In an action to abate a mill-pond as a nuisance, the party applying for the abatement is not estopped by the fact that he is a stockholder in the company which owns the mill-pond.—*Leonard v. Spencer*, N. Y. Ct. App., Feb. 10, 1888; 15 N. E. Rep. 397.

149. OFFICERS—Misconduct—Constitution.——The act of 1873-74, p. 911, regarding the removal of civil officers, and the act of March 30, 1874, imposing a fine on civil officers who violate their duties, are repealed—the former by the constitution of 1879, the latter by the act of March 14, 1883.—*Fraser v. Alexander*, S. C. Cal., Feb. 20, 1888; 16 Pac. Rep. 757.

150. PARENT AND CHILD—Divorce.——Where, by a decree of divorce, the marriage is dissolved on account of her husband's misconduct and the care and custody of the children is confided to the wife, and alimony allowed to her, the husband is nevertheless bound to support the children until they are able to support themselves.—*Pretzinger v. Pretzinger*, S. C. Ohio, Dec. 13, 1887; 15 N. E. Rep. 471.

151. PARENT AND CHILD—Emancipation.——An insolvent debtor may emancipate his minor children, and his creditor will have no claim to the proceeds of their labor.—*Shortel v. Young*, S. C. Neb., Feb. 15, 1888; 36 N. W. Rep. 572.

152. PARTITION—Defense—Failure to Set Up.——When a party claiming through execution proceedings fails to set up his interest in his answer in a partition suit, he cannot, after final decree upon receiving the sheriff's deed, obtain redress based on that deed.—*Bobb v. Gilmore*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 5.

153. PARTNERSHIP—Contract—Estoppel.——Where a claim is assigned to a partnership, and is afterwards assigned by the assignee of the assignor, who has become insolvent, to a member of the firm, the latter is estopped to claim that the first assignment was void, as a fraud on the assignor's creditors.—*Crawford v. Halsey*, U. S. S. C., Feb. 20, 1888; 8 S. C. Rep. 641.

154. PARTNERSHIP—Liquidating Partner.——A liquidating partner is not entitled to compensation for services as such in the absence of contract.—*Appeal of Shriver*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 553.

155. PATENTS—Infringement—Injunction.——Where it appears from the defense that, if sustained, the patent will be sustained on a very narrow margin, a preliminary injunction will be denied.—*Glaenzer v. Weiderer*, U. S. C. C. (N. Y.), Nov. 1, 1887; 33 Fed. Rep. 585.

156. PATENTS—Licensee—Equity.——A licensee cannot sue in equity for infringement of the patent.—*Ulman v. Chickering*, U. S. C. C. (Mass.), Jan. 16, 1888; 33 Fed. Rep. 582.

157. PATENTS—Soda-fountains.——The re-issue on Aug. 5, 1879, of patent issued June 25, 1872, for soda-fountains, omitted to claim the tin vessel, incased by a steel cylinder and ends soldered to the latter: *Held*, that as the patent called for a joint made with a pure tin solder, the use of a solder half tin and half lead was no infringement.—*Matthews v. Iron, etc. Co.*, U. S. S. C. Jan. 23, 1888; 8 S. C. Rep. 639.

158. PLEADING—Amendment—Costs.——When the plaintiff is not injured thereby, defendant will be allowed to amend by putting in a new defense upon paying taxable costs.—*Arnold v. Chesebrough*, U. S. C. C. (N. Y.), Dec. 13, 1887; 33 Fed. Rep. 571.

159. PLEADING—Answer—Ejectment.——When a petition in ejectment avers that the plaintiff is the owner and entitled to the possession, an answer containing no denial but averring that plaintiff claims under a tax-title and setting up several defenses thereto is bad on demurrer, in not alleging that plaintiff's title is based solely on the tax-title.—*Caines v. Katz*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 18.

160. PRACTICE—Judgment—Record—Statute.——A judgment is not a written instrument in the sense of the Indiana statute which makes written instruments filed as cause of action in suits a part of the record. In an action brought upon judgment to enjoin its enforcement the attaching of a copy of it to the complaint does not make it a part of the record.—*Dumbould v. Rowley*, S. C. Ind., Feb. 18, 1888; 15 N. E. Rep. 463.

161. PRACTICE—Nonsuit—Reversal.——Though a nonsuit be improperly awarded, yet it cannot be reversed on writ of error if it be not excepted to.—*McBride v. Latham*, S. C. Ga., Oct. 11, 1887; 4 S. E. Rep. 927.

162. PRACTICE—Reference—Trial by Jury.——In a suit on an administrator's bond a reference was made and the report of the referee was excepted to. The court overruled the exceptions and directed a verdict by the jury in accordance with the report: *Held*, erroneous, since defendant was entitled to a trial by jury.—*Poullian v. Brown*, S. C. Ga., Jan. 30, 1888; 5 S. E. Rep. 107.

163. PRACTICE—Trial—Verdict.——The judgment must follow the verdict. Where a jury finds a verdict for the plaintiff for $800 and for the defendant for $300, the judgment should be rendered for the plaintiff for $500.—*Baughan v. Baughan*, S. C. Ind., Feb. 15, 1888; 15 N. E. Rep. 466.

164. PRINCIPAL AND AGENT—Commissioners.——An agent found a purchaser, who paid part of the price and tendered the rest in checks, which were refused. After the time specified had passed he conveyed the property to his father, saying that he did not intend to pay the agent any commission. The father conveyed to the first purchaser on the payment of the balance agreed on: *Held*, that the agent was entitled to his commission.—*Wilson v. Sturgis*, S. C. Cal., Oct. 28, 1886; 16 Pac. Rep. 772.

165. PRINCIPAL AND AGENT—Fraudulent Purchase.——When an agent conceals from his principal material

facts relative to the value of his land, and by subterfuge fraudulently purchases it from the principal in the name of another, the deed may be set aside.—*Bookwalter v. Lansing*, S. C. Neb., Feb. 9, 1888; 36 N. W. Rep. 549.

166. PRINCIPAL AND AGENT — Creditor — Laches.——When the holder of a note promises a surety on his request to proceed against the estate of the principal, upon whose estate no letters of administration have been taken out, the surety is not relieved by the failure of the holder to take out letters on the estate.—*Brown v. Flanders*, S. C. Ga., Feb. 1, 1888; 5 S. E. Rep. 92.

167. RAILROADS — Charters—Damages.——Under the charter of the Northern Central Railway Company, that corporation is liable for consequential damages to individuals arising from the construction of a new line in proximity thereto.—*Northern, etc. Co. v. Holland*, S. C. Penn., Jan. 3, 1888; 12 Atl. Rep. 575.

168. RECEIVER—Leave to Sue.——A party cannot sue a receiver in another county, where he and the receiver both reside, without leave of court.—*Piper v. Stratten*, S. C. Tex., Nov. 1, 1887; 7 S. W. Rep. 45.

169. SALE—Acceptance—Burdens of Proof.—— Where a machinist sells machinery to a person upon condition that it should be inspected and approved by the buyer before shipment, and it is so inspected and approved, the burden of proof is upon the purchaser to show that the machinery was of inferior quality or otherwise below the grade of workmanship that he had bargained for, and that it had received, while in his hands, fair treatment to test its merits.—*Whitney, etc. Co. v. Reuss*, S. C. La., May 31, 1887; 3 South. Rep. 500.

170. SCHOOLS — Teacher — Corporal Punishment—Assault and Battery.——A teacher is not guilty of assault and battery who inflicts corporal punishment upon a pupil, upon his election to receive such punishment instead of expulsion from the school. Construction of Indiana school laws.—*Vanvacter v. State*, S. C. Ind., Feb. 9, 1888; 15 N. E. Rep. 341.

171. SHIPPING — Charter-party — Ventilation. —— A clause in a charter-party providing that ventilation should be made by the charterers does not remit the whole subject of ventilation to the unlimited discretion of the charterers. The other party has a right to require that the ship be properly ventilated.—*Russell v. Allerton*, N. Y. Ct. App., Feb. 7, 1888; 15 N. E. Rep. 391.

172. SUBROGATION—Corporation — Mortgage.——When a corporation becomes insolvent after executing a mortgage, the mortgagee cannot be sustituted to the claims of those persons who take preference over the mortgage.—*Traders' N. Bank v. Woodlawn M. Co.*, S. C. N. Car., Feb. 21, 1888; 5 S. E. Rep. 81.

173. TAXATION—Board of Equalization—Constitutional Law.——The act creating the State board of equalization, authorizing to change the assessment valuation of the counties when found to be wrong, is constitutional.—*Spalding v. Hill*, Ky. Ct. App., Feb. 11, 1888; 7 S. W. Rep. 27.

174. TAXATION — Delinquent Taxes — Tax-collector — Statutes.——Construction of Louisiana statutes relative to taxation, delinquent taxes, and the deeds of tax-collectors for land sold on account of delinquent taxes.—*In re Lake*, S. C. La., May 24, 1887; 3 South. Rep. 479.

175. TAXATION—Illegality—Injunction.——Under North Carolina law, an injunction cannot issue to restrain the collection of taxes on land of a railroad company, which both the federal and State courts have decided to be illegal.—*Raleigh, etc. R. Co. v. Lewis*, S. C. N. Car., Feb. 27, 1888; 5 S. E. Rep. 82.

176. TAXATION — Sale — Assessment.——Construction of Pennsylvania statutes relative to taxation and tax-sales. A purchaser at tax-sale gets a marketable title if other proceedings are regular, notwithstanding irregularities in the assessment.—*Reeves v. Alter*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 551.

177. TAXATION—Sale—Deed.——A tax-deed including several tracts is void, under Missouri law, unless it sets out that each tract was sold separately for the tax against it.—*Allen v. Buckley*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 10.

178. TAXATION—Sales—Time — Pleading.——A bill to set aside a tax-sale is not demurrable, because it does not state that the deferred sale for taxes was made within the hours permitted for sheriff's sales.—*Clarke v. Franke*, S. C. Miss., May 23, 1887; 3 South. Rep. 531.

179. TAXATION—Suit—Assessment Roll.——In an action by a county to recover taxes, the assessment roll is *prima facie* evidence of the plaintiff's rights to recover.—*Modoc Co. v. Churchill*, S. C. Cal., Feb. 21, 1888; 16 Pac. Rep. 771.

180. TAXATION—Taxable Value.——For the purposes of taxation the value of property is the amount for which it could be sold at a fair sale for cash in the ordinary course of business, and not at a forced sale.—*Morgan's, etc. Co. v. Board of Reviewers*, S. C. La., Nov. 21, 1887; 3 South. Rep. 507.

181. TENANT IN COMMON—Action—Co-owner.——When a co-owner in *indivisum* of immovable property brings an action in his own name for the entire damage done by a trespasser, the citation will avail to interrupt presumption as to the other co-owner, who afterwards joins in the action.—*Becnel v. Wagnespack*, S. C. La., Feb. 13, 1888; 3 South. Rep. 536.

182. TRADE-MARK—Injunction.——Where a party sells silk of an inferior quality, believing it to be the best of the production of the manufacturers whose trade-mark it bears, but finding it to be inferior takes it back, he is not liable to an injunction against selling inferior goods under that trade-mark.—*Appeal of Wilcox*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 578.

183. TRUSTS—Land Obtained by Fraud.——When title to real estate is wrongfully obtained by a misdescription in the deed, and the grantee conveys the land, equity will compel him to account for the value thereof, and will follow the proceeds so long as they can be traced.—*Coggswell v. Griffith*, S. C. Neb., Feb. 8, 1888; 36 N. W. Rep. 538.

184. TRUSTS—Resulting—Purchase Money.——Where A, acting as the agent of B, buys land, taking the title in his own name and paying the purchase money, which B repays him, he holds the title in trust for B.—*Hellman v. Messmer*, S. C. Cal., Feb. 20, 1888; 16 Pac. Rep. 766.

185. TRUST—Trustee — Co-trustee.——Where, by the terms of the trust, the trustees were authorized to appropriate part of the principal to the uses of the *cestui que trust*, and one trustee turns over to his co-trustee a portion of the trust funds for that purpose, he is not liable for his co-trustee's misapplication of such funds.—*Appeal of Hatch*, S. C. Penn., Feb. 20, 1888; 12 Atl. Rep. 593.

186. VENDOR'S LIEN—Conveyance to Another.——A vendor has a lien on land sold in the hands of the grantee, though by agreement of the parties the note for the unpaid money is made by A and the deed is made to B.—*Crampton v. Prince*, S. C. Ala., Jan. 13, 1888; 3 South. Rep. 519.

187. VENDOR—Vendee—Misrepresentations.——When a purchaser residing near property and knowing its value, misrepresents it to the owner, a resident of another State, with no knowledge thereof, and states that the owner's title has been conveyed for taxes, the deed of sale may be set aside.—*Morgan v. Dinges*, S. C. Neb., Feb. 1, 1888; 36 N. W. Rep. 544.

188. VENDOR AND VENDEE — Partition —Parties.—— Where a suit is brought to recover back purchase money paid for land, on the ground of defective title, such suit can be maintained, if it appears that in a former partition proceeding, person's having an actual interest in the land were not made parties to the proceeding. — *Moore v. Appleby*, N. Y. Ct. App., Jan. 17, 1888; 15 N. E. Rep. 377.

189. WILL — Bequest—Election.——An executor cannot sue a person for a debt due the estate, when the will provided that his wife should take no part in the estate, unless he paid over such money, since he could

pay the money or treat it as an advancement.—*Darne v. Lloyd*, S. C. App. Va., Jan. 27, 1888; 5 S. E. Rep. 85.

190. WILL — Construction —Powers.—— Statement of the terms of a will, under which it is held that the widow was vested with an estate for life in all the property of a testator with a power of disposing of the same during her life, but that at her death what remained at the estate was vested in the children of the testator and the representives of those of them who had previously died, they taking *per stirpes* and not *per capita*.—*Wood v. Robertson*, S. C. Ind., Feb. 16, 1888; 15 N. E. Rep. 457.

191. WILL — Contract —Description.——A contract to make a will in which the testator agrees to give half his estate to a named party, sufficiently describes the property to be so disposed of.—*Roehl v. Haumesser*, S. C. Ind., Feb. 8, 1888; 15 N. E. Rep. 345.

192. WILL — Estate Tail—Power of Appointment.—— Circumstances stated under which it was held that a will devising lands to J, with a power of appointment but with a remainder over to his heirs did not create an estate-tail, but that the heirs of J took as devisees under the will of their ancestor, J taking only an estate for life.—*McDonald v. Dunbar*, S. C. Penn., Feb. 6, 1888; 12 Atl. Rep. 553.

193. WILL—Legacies—Discretion.——Where a widow, who was appointed executive, allowed by the will discretion as to whether she should pay certain legacies, the unpaid part thereof cannot be charged after her death on land which she has disposed of by will.—*Girard v. Futterer*, S. C. Ala., Jan. 12, 1888; 3 South. Rep. 516.

194. WILL — Legacies — Vested Interest. —— A will which gives to certain parties a remainder interest contingent upon their surviving the first legatee or their leaving issue so surviving, such remainderman take a vested interest capable of passing by assignment.—*Appeal of Churchman*, S. C. Penn., Feb. 20, 1888; 12 Atl. Rep. 600.

195. WILL—Ornaments—Jewelry.——A will bequeathed to A finger-rings and such books, pictures and ornaments as she should choose to take: *Held*, that ornaments included jewelry and many things not so classed.—*In re Traylor*, S. C. Cal., Feb. 25, 1888; 16 Pac. Rep. 774.

196. WILL —Provision for Support—Debts.——Where an executor is trustee under the will of property, the income of which is to be used so far as needed for her support, and it appears that it is insufficient for her support, and is old and infirm, and has no other support, it is error to apply the income to paying a judgment against her, not for necessaries furnished to her.—*Barnett v. Montgomery*, S. C. Ga., Jan. 9, 1888; 4 S. E. Rep. 874.

197. WILL—Rights of Legatees—Execution.——A obtained judgment against B as guardian, for trust funds in her hands, and levied on a house and lot, which was bequeathed to her by will, wherein she was executrix, and as executrix she received money due C, which she had not paid over: *Held*, that C could claim no lien on the house and lot.—*Porter v. Ford*, Ky. Ct. App., Jan. 10, 1888; 7 S. W. Rep. 29.

198. WITNESS — Corroboration — Statements.——It is not permissible to corroborate a witness by showing that he had made similar statements before.—*Fallen v. State*, S. C. Ala., Jan. 23, 1888; 3 South. Rep. 525.

199. WITNESS — Cross-examination —Intervenor.—— Plaintiff and defendant have reciprocally the right to cross-examine each other's witnesses, and this rule is not affected by the fact that a party has been permitted to intervene whose interest is opposed to both parties. The right to cross-examine in all such cases remains intact. — *Succession of Township*, S. C. La., Nov. 21, 1887; 3 South. Rep. 488.

200. WITNESS — Grantor — Declarations. —— When a grantor is a witness to prove the *bona fides* of his deed, his declarations made after the date of the deed are admissible to contradict him.—*Weiss v. Oliver*, S. C. Tex., Nov. 1, 1887; 7 S. W. Rep. 47.

QUERIES AND ANSWERS.*

QUERY NO. 18.

Section 626, Rev. Stat. of Indiana of 1881, provides, "that the party objecting to a decision must except at the time the decision is made, but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court." The court under this section grants a party ninety days beyond the term to prepare and file his bill of exceptions. The judge, before the expiration of the time, leaves the State and goes, say to Madison, Wisconsin, and does not return until the expiration of the time. The party completes his bill before the time expires and has it ready for the signature of the judge, who, upon his return after the time has expired, refuses to sign it for the reason that the time given has expired. Is the judge responsible in damages to the injured party? FORENSIC.

QUERY NO. 19.

A owns a note of $200 against B, who has removed to a distant town. A hands the note to C, an attorney, asking him to collect the same. C forwards note to D, an attorney, who resides in same town where B now lives. D succeeds in collecting amount, but refuses to remit any portion of it. Is C liable to A for the dishonesty or insolvency of D? Please quote authorities. Y.

QUERIES ANSWERED.

QUERY NO. 16 [*26 Cent. L. J. 335.*]

A will, made in the State of Indiana, divising certain lands in that State, provides, "that the foregoing lands are for the use and benefit of my daughter Jane during the term of her natural life and to her and to the heirs of her body, if any there be, forever; but if at the time of her death she shall not have any living child or children, then, in that case, I give and bequeath and devise the reversion and remainder of the above described lands to A, B and C, share and share alike, or the survivors of them, and the survivors of their children." 1. The rule in Shelley's Case being the law in Indiana, does not Jane take the fee in the lands? 23 Ind. 30; 26 *Id.* 251; 109 *Id.* 476; 111 *Id.* 391. 2. Would not a quitclaim from A, B and C release their right, if any, it being conceded that Jane has no issue and cannot have children? 3. Is the remainder over to the children of A, B and C, and their survivors, void as being in conflict with Rev. Stats. of Ind. 1881, § 2962? Q.

Answer. We will answer the questions in inverse order. 3. We do not see that the remainder is in conflict with the statute, since it is intended to vest on Jane's death. 2. Conceding the remainder to A, B and C to be valid, they can convey their interest, but the children of one, who died before Jane, would not be bound thereby. 2 Wash. Real Prop. [5th ed.] 600. 1. We consider the remainders to be void, and that Jane has a fee simple, under the decisions quoted, especially Alien v. Craft, 109 Ind. 476. M.

QUERY NO. 17 [*26 Cent. L. J. 335.*]

A sold a tract of forty acres to B in 1858; in 1861 B sold said forty acres to C. C has lived on land ever since and made many improvements thereon; both B and C gave full value for land. In the deed from A to B, A described the wrong forty acres—likewise did B when he sold to C. About two years ago C ascertained that there was a mistake in description. In 1860, A sold another forty acres to D, which forty

acres is described in sale from A to B. D took possession of said forty acres and subsequently sold it and it is now owned by divers parties. The various deeds were recorded in order of sales. A was a bachelor, and after disposing of all his lands, as he supposed, went back to his native home. He has not been heard from in about twenty years; rumor says he is dead. He left no heirs to the knowledge of any one about here. The title (paper) to the first forty acres is still in A. The statute of limitations is five years. Of course C has good title against all the world, but there is a cloud on it. C's land is now very valuable and parties desire to buy it, but object to paying full value owing to defective title. Query: How can C remove cloud? If suit be brought, who will be party defendant? SUBSCRIBER

Answer. If there is no statute of limitations in the way, B can sue A to correct his deed. 3 Wash. Real Prop. (5th ed.) 405. C can, if necessary, bring a similar suit against B. B's suit should be against A, or, if dead, his heirs, since only parties to a suit are bound by it, and the necessary information should be obtained. Of course, the better way is for C to obtain a quitclaim from A or his heirs, though any action seems unnecessary, under his title by adverse possession. H.

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF TAX TITLES, their Creation, Incidents, Evidence and Legal Criteria. By Henry Campbell Black, M. A., Author of a Work on Constitutional Prohibitions, etc. St. Louis, Mo.: William H. Stevenson, Law Publisher and Publisher of the Central Law Journal. 1888.

As is said in his preface by the author of this work, there was a time when a tax-title was almost a solemn mockery. But that time has passed. Many laws have been enacted of late years to strengthen tax-titles, till now it sometimes looks as though the rights of the property owner were neglected. Since property rights may be sacrificed from neglect to pay an insignificant tax, it behooves the negligent to know their rights in the premises, and the purchasers to ascertain what titles they are acquiring. Often questions arise as to the duties of different parties in interest relative to paying the taxes, and in case of default by others the rights accruing to them by payment thereof. Again, the law forbids certain parties from acquiring any title through a tax-sale, owing to their interest in the land or their relations to the owner thereof. It often occurs that land is in litigation, yet taxes must be paid by some one to preserve the property. So lienors, incumbrancers or judgment creditors must sometimes protect their interests in the same manner. All these questions the author treats, as well as the constitutional points involved, combinations among buyers at tax-sales, and in fact everything relating to such subjects as indicated by the title of the work. Where there are divergencies of rulings, the reasoning on each side is given. To those who are familiar with the writings of this author, it is needless to say that the work is thorough, terse, clear in statement and supplied with copious references to the decisions. The book is of great value to every practitioner, particularly since so much of the legislation on the subject is subsequent to other kindred treatises.

JETSAM AND FLOTSAM.

There are many Chinese in Australia, and their names, which sound like a burlesque, sometimes perplex the lower officials of the courts, who generally are Irishmen; but Pat's agile fancy always opens some sort of a door for him to go in or out when he is obliged to deal with Ah Foo, Ah Sue, or Fong Fat.

An Irishman, a newly appointed crier in a county court, was ordered by the judge to summon a witness to the stand.

"Call for Ah Song," was the command.

Pat was puzzled for a moment; he glanced shyly at the judge, and found him as grave as an undertaker. Then, turning to the spectators, he blandly simpered: "Gintlemin, would any of you favor his Honor with a song?"

In another court an Irish policeman, not long in the country, was ordered by the judge to go in search of the official interpreter. "Constable, go for Ah Kat," said the judge.

"Yes, your Honor. Is it a Tom cat your Honor wishes for?"

HE HAD A HEART.—"I suppose I'm all to blame," he was explaining at police headquarters yesterday, "but you see I'm in here on the jury and not up to all the tricks. I was out for a walk last night, and as I crossed Washington avenue at State street a woman came walking up to me and said:

" 'Oh, mister, have you got a heart?'

"I said 'I had.'

" 'Then, sir,' she went on, 'protect me from a brute of a man and see me home.'

"Just then I saw a man approaching, and the woman flung herself into my arms. The fellow came up within ten feet, cussed and growled a little, and then went off. When he had disappeared the woman thanked me for my bravery, asked my name and address, and went off the opposite way. She had been gone ten minutes when I missed my watch and wallet. I hate to think she took it, but——"

"But she did."

"Well, yes. I hate to let folks know how green I am, but I suppose I'll have to, and so I come to have her arrested."

EX POST FACTO.—A police magistrate a long time ago was a what is sometimes called a "slowly" man. He arrived at correct conclusions, but not as promptly as more gifted people. He was especially obtuse in the matter of humor, and only appreciated a joke after very full consideration. For example, in an affray case, a witness testified that Mr. Jones kicked Mr. Smith's hat, and was asked by a lawyer whether Mr. Smith's head was in his hat when Jones kicked it. There was, of course, a mild giggle in the audience at this forlorn witticism, but the magistrate was very grave and rapped vehemently for order. An hour after the adjournment, he was observed on the street to be laughing heartily, although alone. What is the fun judge? asked a passerby. "Ho! ho! ho!" responded the judge convulsed with merriment, "I was thinking of that question about Smith's head being in his hat when Jones kicked it. Capital joke, ha! ha! ha!" He had caught up with the joke, such as it was, after three hours' meditation.